Prescription for Fairness

Special Report: Out of Country Health Services

ALBERTA OMBUDSMAN

Focused on Fairness

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EXECUTIVE SUMMARY

"It was stated that the expertise was available in Alberta and other Canadian centers. I would like to know how the decision was made as to who was an appropriate expert and who these experts are." – Emerald Raho

Two and a half years ago, Emerald Raho contacted the Alberta Ombudsman, G. B. (Gord) Button, with a complaint about Alberta's out of country health services program. She had taken her twin daughters to Chicago for treatment of extreme sleep disorders and head banging, at the suggestion of the Canadian Sleep Institute in Calgary, after exhausting Canadian options for treatment. Both the Out-of-Country Health Services Committee (the Committee) and the Out-of-Country Health Services Appeal Panel (the Appeal Panel) had denied her request for reimbursement because "expertise was available in Alberta and other Canadian centres," a claim that left Ms. Raho both puzzled and frustrated.

In fact, the Ombudsman was already investigating complaints about the out of country health services program when he received Ms. Raho's letter. At the time this own motion investigation was initiated, 10 investigations were in progress. In four of those investigations, the Ombudsman recommended the Appeal Panel re-hear the appeals, recommendations which the Appeal Panel rejected. In an attempt to resolve the issues of administrative unfairness that had been identified, the Ombudsman met with the former and current Appeal Panel Chairs without success. The Ombudsman brought his concerns about these refusals to the attention of the former and current Ministers of Health and Wellness, also without success. The refusal to implement the Ombudsman's recommendations for the four completed investigations (documented in Section III - Previous Ombudsman Recommendations) remains unchanged.

Similar concerns about lack of reasons for decisions were noted by the Alberta Court of Queen's Bench in *McGregor v. Alberta (Out-of-Country Health Services Appeal Panel)*, 2007 ABQB 138, as it quashed the decisions of both the Committee and the Appeal Panel.

The complaints from Ms. Raho and other Albertans—some seeking potentially life-saving treatment—prompted the Ombudsman to launch a broader investigation of the out of country health services program offered by the Department of Health and Wellness (the Department) on December 2, 2008.

The investigation focused on whether the Department is meeting the needs of Albertans in accessing out of country health services that either are not available in Alberta or Canada or are not available in a timely manner.

The purpose of the investigation was to review the administrative fairness of:

- how Albertans are informed of the availability of funding for out of country health services
- how medical practitioners are informed about the requirements and availability of the program
- how out of country claims are reviewed by the Department

- how decisions are made by the Committee and the Appeal Panel
- how wait times factor into the decision making process
- how decisions are conveyed to Albertans

The field work was conducted by two Team Leaders/Senior Investigators and an Investigator. The team was assisted by the Deputy Ombudsman, the Ombudsman's Senior Legal Counsel and an Administrative Assistant. After the investigation was announced, investigators discussed concerns with 59 people who called in. The Ombudsman also received 39 written complaints, 20 of which were opened for investigation on an individual basis. As well, 10 files were under investigation prior to the start of the investigation. The team also reviewed 122 Appeal Panel files dating back to April 1, 2004, and 186 Committee files, a statistically valid selection of the over 400 Committee files dating back to April 1, 2004. As well, the investigative team formally interviewed all the members of the Committee and Appeal Panel and also staff from the Department.

Recommendations

Prescription for Fairness makes 53 recommendations to improve administrative processes related to the communication, review and decision making regarding applications for funding of out of country health services. The recommendations are grouped under the Committee, the Appeal Panel, and the Department. The major recommendations are summarized as follows.

Recommendations Respecting the Out-of-Country Health Services Committee

Regarding applications for funding, the Ombudsman recommends:

- **All requests to the Committee for funding of out of country health services be submitted by a physician or dentist on behalf of a resident, and the *Out-of-Country Health Services Regulation* be amended to reflect this requirement. The resident on whose behalf the application is submitted should be copied on all subsequent correspondence from the Committee.**
- **Applications include written reports of consultations with specialists, and the *Out-of-Country Health Services Regulation* be amended to reflect this requirement.**

These recommendations reflect the belief that physicians and dentists are best positioned to gather and present information on treatment availability and wait times. Therefore, it is in the best interest of residents of Alberta to have medical and dental practitioners complete the applications. As opposed to Alberta, most provinces require applications for funding of out of country health services to be submitted by physicians.

Regarding the management of the Committee, the Ombudsman recommends:

- **Appointment dates for members should be staggered to promote continuity. The Committee members should be required to undergo training to enhance skills in decision making and writing.**

Regarding hearings, the Ombudsman recommends:

- **Before hearings are conducted, the Committee assess its jurisdiction in all cases, such as those where time limitations have been breached. If more information is required before a hearing, the letter of request should note that it is from the Committee Chair.**
- **The Committee respond in writing to all requests for in-person hearings.**
- **The Committee send the applicant the same package that is distributed to all the Committee members with notice of the date of the hearing so the applicant can respond to new evidence.**

To enhance public communications, the Ombudsman recommends:

- **The Committee work with the Department to create a stand-alone application form specific to the types of requests it is mandated to consider.**
- **The applications and Committee information sheet should be easily accessible on the Department website and in hard copy form.**

In its decision letters, the Committee should:

- **Document the names of members who participated, the *Out-of-Country Health Services Regulation* giving them authority, all matters arising prior to hearing the case such as conflicts of interest, its findings of fact, and how the Committee weighed the evidence before it and how it applied the legislative criteria.**
- **Provide a list of physicians or health centres in Canada that the Committee determined are available to perform the service requested, provide evidence that the service is available in a reasonable time frame, and document available appeal rights.**
- **Develop a practice or procedure to deal with new information submitted after the written decision is issued.**

Recommendations Respecting the Out-of-Country Health Services Appeal Panel

The Appeal Panel was created at the same time as the Committee (1996), to hear appeals of Committee decisions. The Appeal Panel has the legislative authority to confirm or vary the decision of the Committee or substitute its decision for the Committee's decision.

As with his recommendations regarding the Committee, the Ombudsman recommends:

- **Before hearings are conducted, the Appeal Panel should determine its authority to hear the appeal with respect to the current 2006 *Out-of-Country Health Services Regulation* and the issue of whether the appellant is submitting new evidence. The Appeal Panel should develop a definition of what constitutes new evidence.**

- **Decision letters issued by the Appeal Panel should document its authority to hear the appeal, the names of the members who participated in the decision, identification of the issue, conflicts of interest, all of the material considered in the decision, its findings of fact, how it weighed the evidence, and how it applied the legislative criteria. The decision must address the major arguments of the appellant. A copy of the decision should be forwarded to the Minister of Health and Wellness.**

Additionally the Ombudsman recommends:

- **Appellants' files should contain documentation of all contacts relating to the appeal and a copy of the Appeal Panel decision. All documentation received by the Appeal Panel should be date stamped.**

Regarding management of the Appeal Panel, the Ombudsman recommends:

- **Recruitment of members follows an open and transparent process, and the interview panel include a member of the Appeal Panel.**

- **New members receive orientation and training opportunities.**

- **The Appeal Panel procedural binder be reviewed and updated on a regular basis.**

Regarding the four completed investigations where recommendations for a re-hearing have not been accepted, the Ombudsman recommends:

- **The Appeal Panel should conduct re-hearings of these appeals. The resulting decisions should comply with the principles of administrative fairness as outlined in this report.**

Recommendations Respecting the Department of Health and Wellness

Recommendations to the Department deal mostly with communications to the public, and physicians and dentists. The Ombudsman recommends:

- **The Department provide a direct link to the out of country health services portion of the website on its home page to improve accessibility to information.**
- **The Department should amend the Committee information sheet, the *Alberta Health Care Insurance Plan* pamphlet and the *Physician's Resource Guide* to provide more complete information about the appeal process and to state that funding can be approved after the service is performed in certain circumstances. The Department should inform all registered physicians and dentists of the changes that have been made.**

What the recommendations mean for Albertans

If Ms. Raho applied for funding today, and the Ombudsman's recommendations were fully adopted, she would receive a full accounting of the evidence considered, the decision made, and the expertise available in Alberta or Canada. She still may be denied funding, but at least she would understand why.

Further, the recommendations will ensure Albertans have better access to information about out of country health services. Physicians and dentists will have the information they need to support and complete applications. As importantly, acceptance of the recommendations will reassure Albertans that the decisions made are fair and reasonable.

BACKGROUND

Numerous complaints from Albertans who were denied funding to go out of country to receive health services—with some seeking potentially life-saving treatment—prompted this own motion investigation. In the complaints investigated by the Ombudsman, Alberta residents were denied funding by the Committee or the Appeal Panel without a clear explanation as to what evidence was considered and what criteria were used.

In many cases, the Committee and Appeal Panel determined services were available within Alberta or Canada, but did not explain how they reached that conclusion, including what is considered a reasonable wait time for the health services in question.

> "Applicants have told me this is about more than funding, it is about getting answers to their questions," the Ombudsman said when the own motion investigation was announced in December 2008. "My investigation, which will begin immediately, will focus on the fairness of the administrative process used to review and assess applications for funding from Albertans."

The Ombudsman had raised his concerns arising from individual investigations with the Appeal Panel on several occasions. In response, the Appeal Panel stated it has taken steps to better train its members and improve their decision writing skills. The Ombudsman recommended in four recent individual investigations that the Appeal Panel re-hear the appeals because of the extent of the findings of administrative unfairness identified in the decisions. In responding, the Appeal Panel rejected the Ombudsman's recommendations. In an attempt to resolve the issues of administrative unfairness that had been identified, the Ombudsman met with the former and current Appeal Panel Chairs. The Ombudsman brought his concerns about the refusal to accept the recommendations for re-hearing to the attention of the former and current Ministers of Health and Wellness. The refusal to implement the Ombudsman's recommendations remains unchanged.

The correctness of an Appeal Panel decision was considered by the Alberta Court of Queen's Bench in *McGregor v. Alberta (Out-of-Country Health Services Appeal Panel)*, 2007 ABQB 138 (the McGregor decision) (Appendix B). In that case, Mr. McGregor's application for funding for health services he received out of country was not approved by the Committee. On appeal, the Appeal Panel confirmed the decision of the Committee. In concluding that the Appeal Panel decision was not correct, the Honourable Mr. Justice D.A. Sirrs stated the following at paragraphs 35 through 41 of his decision:

> The decision of the [Appeal Panel] was to deny the appeal. The reason given was that Canadian resources had not been fully utilized. No attempt was made to recite any facts upon which the Appeal Panel relied. I am left with the view that the Appeal Panel is suggesting that the appeal had no merit whatsoever and thus could be summarily dismissed. The requirement to give reasons is mandated by s. 28.07(5) of the

> [*Alberta Health Care Insurance Regulation*], and thus being a legal requirement, the test upon review is correctness. In my view, the reasons of the Appeal Panel are obscure and at best could be said to adopt the reasons of the [Committee]. These reasons fail to address the grounds of appeal. I find the reasons to be so sorely lacking in substance that they fail to provide Mr. McGregor any understanding why his request for funding was denied. If it could be said that the [Appeal Panel] met the legal requirement to provide a reason for its conclusion, I have no finding of facts to be able to determine whether or not their decision was reasonable.

The Court quashed the decisions of both the Committee and the Appeal Panel and directed that Mr. McGregor be entitled to submit a new application for funding to the Committee within 90 days of the Court hearing.

Concerns about the lack of reasons for decisions similar to those identified by Mr. Justice Sirrs in the McGregor decision have been identified by the Ombudsman in respect of Appeal Panel decisions in a number of the individual complaints that have been investigated by the Alberta Ombudsman's office to date. Decisions rendered by the Appeal Panel subsequent to the McGregor decision still do not provide the rationale for the decisions found wanting by Mr. Justice Sirrs.

The Ombudsman's concern that his recommendations to the Appeal Panel, discussions with respective Ministers, discussions with successive Appeal Panel Chairs and guidance provided by the Court have not resulted in the required change in process, necessitated this investigation.

INVESTIGATION PROCESS

On December 2, 2008, the Alberta Ombudsman, G. B. (Gord) Button, announced he was commencing an investigation, on his own motion, pursuant to Section 12(2) of the *Ombudsman Act* regarding the out of country health services program in the Department of Health and Wellness (the Department) (Appendix A). The investigation team from the Alberta Ombudsman's office that conducted the field work was made up of the two Team Leaders/Senior Investigators and an Investigator. The team was assisted by the Deputy Ombudsman, the Ombudsman's Senior Legal Counsel and an Administrative Assistant. Individual concerns were discussed with 59 members of the public who had called in response to the Ombudsman's invitation when this own motion investigation was publicly announced. During those discussions, Albertans shared their experiences with the out of country health services program. Thirty-nine written complaints were received from members of the public after the own motion investigation was announced and as a result, 20 new files were opened for individual investigation. Ten files that had been opened prior to the commencement of this own motion investigation remain open.

The investigation team reviewed 122 Appeal Panel files with decisions that date back to April 1, 2004. Because there were over 400 Committee files with decisions dating back to April 1, 2004, the team consulted with a senior statistician in the Department of Finance and Enterprise for assistance in the selection of a statistically valid number of files. Based on the results of that consultation, the team reviewed 186 Committee files selected at random.

The investigation team interviewed, and in some cases re-interviewed:

- 13 staff from the Department
- the four members of the Committee
- the Committee Chair
- the six members of the Appeal Panel
- the Appeal Panel Chair
- three Department employees providing administrative support to the Committee
- one Department employee providing administrative support to the Appeal Panel
- the Registrar of the College of Physicians and Surgeons of Alberta

All the Department interviews were conducted in the presence of Department legal counsel, and the majority of the Committee and Appeal Panel interviews were conducted in the presence of their independent legal counsel.

The investigation team conducted a review of the current legislation in the other Canadian provinces and the territories governing requests for funding of out of country health services.

In the most recent statistics in a document entitled Year End Report of the OOP/OOC (Out of Province/Out of Country) Special Programs Unit of the Department for the fiscal year ending March 31, 2008, the Department reported an expenditure of $3,545,853.52 for health services approved by the Committee and the Appeal Panel. The amount spent each year is based on demand which is unpredictable. Other factors influencing this amount are the value of the dollar, the aging population, and the influence the current recession may have on decision making regarding travelling out of country for health services.

HISTORY OF LEGISLATIVE AUTHORITY

The *Alberta Health Care Insurance Act* (the *Act*) grants authority to the Minister of Health and Wellness to administer a plan to provide financial benefits for basic health services to all Alberta residents.

There are some situations where the Minister will fund health services obtained outside the country.

The Committee, created in 1996, under the *Alberta Health Care Insurance Regulation*, AR 216/81 (Appendix C), was established as an independent arm's length committee with the legislated mandate to review and make decisions as to whether to approve requests from Alberta residents or their representatives for funding of out of country health services. Prior to this date, an internal committee known as the Out-of-Province Supplementary Assistance Committee made decisions about funding for out of province and out of country health services. It is not the mandate of the Committee to review funding for services when an Alberta resident is travelling in another province or country on vacation or business, and a medical condition arises which requires emergent medical treatment.

Shirley McClellan, the then Honourable Minister of Health expressed the intent of the Committee in a press release dated March 28, 1996:

> "Since the criteria for these funding decisions are medical, applications should and will be reviewed and approved by physicians," said Mrs. McClellan. "This new process will ensure that all applications are reviewed purely on the basis of medical information, and that the policy is applied fairly and equitably. The government will provide necessary funding to carry out the committee's decisions, but the Minister of Health will not influence the actual decisions themselves."

The Appeal Panel was created to hear appeals of decisions of the Committee. The Appeal Panel has the legislated authority to confirm or vary the decision of the Committee or substitute its decision for the Committee's decision.

On April 1, 2006, as the result of a regulatory review, the *Out-of-Country Health Services Regulation*, AR 78/2006 (the *Regulation*) (Appendix D), was enacted under the *Act*. This *Regulation* confirms the role of the Committee is to review applications for funding of out of country health services. An application may be made by a resident of Alberta for approval of payment of expenses:

(i) for "insured services" or "insured hospital services" (as those terms are defined in the legislation);

(ii) that are received outside of Canada;

(iii) where the resident has endeavoured to receive the health services in Canada; and

(iv) when the health services are not available in Canada.

The members of the Committee and the Appeal Panel are appointed by the Minister. The *Regulation* requires the Committee and the Appeal Panel to

send copies of their decisions to the Minister. The Minister must pay for the services approved by the Committee or the Appeal Panel. The Department's claims unit processes payments for approved services.

While the Minister has no involvement in the decision making of either the Committee or the Appeal Panel, the Public Agencies Governance Framework, February 2008, adopted by the Government of Alberta, sets out the roles and responsibilities of Ministers in relation to administrative tribunals at page 15:

> Common understanding of all parties' roles and responsibilities is the primary governance issue for agencies and government. The minister is ultimately responsible to the public for how the work of the government is accomplished; the authority to conduct government business flows from the minister through to the agency, and some level of accountability must flow back. Once a responsibility is given to an agency, the agency must be able to exercise discretion within the bounds of its mandate while being held accountable for its results. Clear statements about roles and responsibilities that are reviewed and regularly accepted by the highest levels of the agency and ministry are essential for good governance.

Section 14 of the *Regulation* requires that the *Regulation* is reviewed for ongoing relevancy and necessity, and will expire on February 15, 2016.

ADMINISTRATIVE FAIRNESS GUIDELINES

The Supreme Court of Canada determined an administrative decision that affects the rights, privileges or interests of an individual triggers a duty of fairness.

Administrative fairness is the forefront of Ombudsman investigations. The Ombudsman's duty is to bring fairness to all actions of government. The Ombudsman will consider all factors when commenting on the fairness of government action.

The Ombudsman analyzes administrative fairness in a broad spectrum of decisions which affect people in a wide variety of ways. They range from decisions of an administrative tribunal made with a defined statutory mandate such as the Committee and the Appeal Panel, to decisions where there is a less formalized or no formalized decision making process.

In determining fairness, the Ombudsman uses the following guidelines to assess whether a decision, recommendation, act or omission is administratively fair.

1. ***Chain of legislative authority***. What legislation created the authority or power to make a decision and to which decision maker was the power granted?

2. ***Duty of fairness***. The courts require that decision making that affects the rights of individuals must follow a fair process. This duty of fairness means there must be procedural fairness in decision making. Greater procedural protection is required if there is:

    - no right of appeal established within the statute;
    - no further appeal mechanism within the department, agency, board or professional body; and
    - a substantial effect on the individual's rights (e.g. loss of financial benefits).

3. ***Participation rights***. Was the complainant given a full and fair opportunity to present his or her case to the decision maker? Was there full disclosure of the case against the person, to the person?

4. ***Adequate reasons***. There must be a rational connection between the evidence presented and the conclusions reached by the decision maker. The decision maker must identify and clearly communicate the decision and the reasons for the decision.

5. ***Reasonable apprehension of bias***. There must be impartiality and independence of the decision maker including relationships to all parties in the matter, both internally and externally.

6. ***Legitimate expectation***. Did the decision maker fail to honour a commitment or follow regular procedures?

7. ***Exercising discretionary power***. A determination is made as to how the discretion is established in the Act, regulation, policy, guidelines, etc. Discretionary decisions are reviewed to determine if there is bad faith, improper purpose or irrelevant considerations.

8. ***Was the decision reasonable***? A reasonable decision does not equate to whether the decision is wrong or whether it might have been decided a different way. A reasonable decision should indicate how the decision maker considered and assessed the arguments and evidence.

I. OVERVIEW

Section 4(1) of the *Regulation* states the Committee shall be composed of four physicians and an employee of the Department. The four physicians currently on the Committee are specialists with diverse professional backgrounds. The Department employee is designated by the *Regulation* as the Committee Chair, and is a non-voting member of the Committee. All the Committee members are appointed by the Minister. Pursuant to Section 6(2) of the *Regulation*, the Committee reports to the Minister.

Section 6(1) of the *Regulation* establishes the authority of the Committee to hear requests for funding for out of country health services as follows:

> The OOCHSC [the Committee] shall review, evaluate and decide on all applications made under section 2 that are declared to be complete by the Chair under section 7.

According to the 2007/2008 Alberta Health Care Insurance Plan Statistical Supplement prepared by the Department for the period April 1, 2004 through March 31, 2008, the Committee reviewed 355 applications of which 180 were approved for funding. Interim statistics provided by the Department indicate the Committee reviewed a further 74 applications for the period April 1, 2008 through November 30, 2008 and approved 45 of those applications. In the same period of time between 2004 and 2008, 128 of the 204 applications that were denied were appealed. The Appeal Panel overturned the Committee decisions on 25 of those applications and approved them for funding.

PROCESSING OF APPLICATIONS

A Nursing Consultant, a Research Officer, and an Administrative Assistant, all employed by the Department, provide research and administrative support to the Committee.

The Administrative Assistant handles inquiries about applying for out of country funding, and sends out a package of information to the person who inquired. That package includes a cover letter attaching a copy of the information sheet entitled "The Out-of-Country Health Services Committee" (Appendix E), a copy of the "Travel Health Insurance Matters" brochure, and directions to send the documents requested in the Committee information sheet to the attention of the Committee Chair. The Administrative Assistant receives the applications, sets up a file, and provides the material to the Committee Chair.

In the capacity as screener, the Committee Chair may conduct an independent investigation, and in doing so, request further documentation after the application is received. The Nursing Consultant or the Research Officer will gather any information required by the Committee Chair, prior to the file going to the Committee for a decision. When the Committee Chair determines the application to be complete in accordance with Section 7(3) of the *Regulation*, the application is forwarded to the Committee for review. There is provision in the *Regulation* for the Committee to request an independent medical opinion, if it believes further information is required.

Section 8(1) of the *Regulation* states the Committee has 60 days to make a decision from the time the application is declared complete by the Committee Chair. Section 8(5) of the *Regulation* requires that the decisions be issued in writing.

II. FINDINGS AND OBSERVATIONS

RECRUITMENT/APPOINTMENT

During this investigation, the process by which Committee members are recruited and appointed was reviewed. The most recent vacancy on the Committee was publicly advertised. The Committee Chair and the Executive Director of the Policy and Innovation Branch of the Department formed the interview panel and their recommendation was forwarded to the Minister who made the final decision regarding the appointment.

The Committee members are appointed by Ministerial Order for a maximum term of three years in accordance with Section 4(2) of the *Regulation* with eligibility for re-appointment. The Committee Chair is also appointed by Ministerial Order and his term continues for as long as he is an employee of the Department.

The three members eligible for re-appointment were appointed for one-year terms commencing March 27, 2009. The appointment of the newest member is also for a one-year term, ending March 26, 2010. This investigation determined that there has been limited turnover in the membership on the Committee; however, when all the appointments expire at the same time, the knowledge and experience of the Committee may not be maintained if some or all of the members are not re-appointed. Staggering the appointment terms would ensure there is a mix of new and experienced members which will enhance the ongoing functioning of the Committee.

The current Committee Chair is a physician, but there is no legislative requirement that the Committee Chair be a physician. It is possible that a future Committee Chair may not be a physician. When a new physician member is being recruited to the Committee, it is important that a physician from the Committee be involved in any interview panel to ensure the principle of competency-based recruiting is maintained as set out in the Public Agencies Governance Framework.

RECOMMENDATION

The appointment dates for the Committee members should be staggered to promote continuity so the ongoing functioning of the Committee is not compromised.

RECOMMENDATION

The Committee should ensure a physician from the Committee participates in the interview of a potential member when recruiting for a vacancy.

ORIENTATION

The focus of orientation should be to provide members with information about the processes and practices of the Committee. Committee orientation

is currently done by the Committee Chair. With the most recent appointee, the Committee Chair has prepared a package of material containing copies of the *Regulation*, the *Alberta Health Care Insurance Act*, the *Canada Health Act*, a list of the Committee and Appeal Panel members, the Committee information sheet, copies of sample decision letters of the Committee, and information on the Committee's administrative processes, including information on the remuneration claim process. The binder also contains the minutes of a 2007 training seminar, and a referral to a document entitled "The Write Stuff" dated May 2007, written by legal counsel for the Appeal Panel, which provides information about decision writing. The Committee Chair will review the processes of the Committee with the new member.

APPLICATION TO THE COMMITTEE FOR FUNDING

Submission of Application

Section 2(3)(a) of the *Regulation* states that applications for funding must be in writing. The applications can be submitted either by a resident of Alberta, a personal representative of the resident, or by an Alberta physician or dentist. Section 2(3)(c) of the *Regulation* states an application must include a letter of support from an Alberta physician or an Alberta dentist.

The funding decisions made by the Committee are based on medical information. Then Minister of Health, Shirley McClellan, described this process in 1996 in these words:

> "Since the criteria for these funding decisions are medical, applications should and will be reviewed and approved by physicians," said Mrs. McClellan. "This new process will ensure that all applications are reviewed purely on the basis of medical information..."

Mr. Justice Sirrs, in the McGregor decision, speaks to limitations an Alberta resident may have in putting forward his own application when he states at paragraph 47:

> Although Mr. McGregor, as a citizen, may not fully comprehend the complexity of a surgery and whether a Canadian specialist were [sic] available, as the applicant for funding, he bears the onus of convincing the OOCHSC [the Committee] of the uniqueness of the procedure, and why no Canadian physician could perform the surgery. As previously indicated, Mr. McGregor either was of the opinion that his operation was so complex that it was obvious no one in Canada could perform the surgery, or because the doctors in Canada had not discussed the "anterior approach" surgery with him, obviously they did not know how to do it.

This investigation found many of the applications submitted to the Committee were from individuals who had done research on their own or had learned of procedures through word of mouth and/or the internet that are being done out of country for conditions similar to that for which they were requesting funding. As Mr. Justice Sirrs noted, limitations exist for Alberta residents in putting forward their own applications.

During this investigation, it was also found that letters of support from Alberta physicians, as required by the *Regulation*, did not consistently provide documentation from the physician as to what specialists' expertise had been sought in Alberta or Canada in order for the Committee to make a determination the service requested was not available in Alberta or Canada.

In the majority of decisions reviewed, funding for out of country health services was most often approved by the Committee on the basis of specialist reporting. A typical reason for denying an application was the lack of specialist reporting.

In discussions with members of the Committee and the Committee Chair, this investigation confirmed the Committee relies heavily on documentation from specialists in support of an application for funding. This was found to be so, even though there is nothing in the *Regulation* that states specialists' opinions are required as part of the application.

During this investigation, a review was conducted of the out of country health services legislation and practices in the other Canadian jurisdictions. As opposed to Alberta, most provinces require applications for funding for out of country health services to be submitted by physicians. In the majority of provinces, it is a requirement that if the resident is to be referred outside of Canada for treatment, the application for out of country funding be submitted by a specialist who identifies a medically necessary service not available in that province or elsewhere in Canada.

Based on their professional knowledge, physicians are in a better position than residents to put forward adequate reasons for the need for medical treatment outside of Alberta or Canada. They are in the best position to present medical evidence to substantiate the availability of a particular health service in Alberta or Canada or whether it is unreasonable for his or her patient to be placed on a waiting list, based on a professional assessment of the medical condition of the patient.

Since the funding decisions made by the Committee are based on a review of the medical evidence available to the Committee, the applications should be submitted by physicians or dentists with supporting clinical evidence provided by the specialists involved in the care of the individual.

Having said that, it would be critical that the resident for whom the health service is being sought, be kept apprised at each stage of the decision making process.

RECOMMENDATION

The Out-of-Country Health Services Regulation should be amended to require that all applications to the Committee for funding be submitted by physicians or dentists on behalf of a resident.

RECOMMENDATION

The Out-of-Country Health Services Regulation should be amended to require that all applications to the Committee for funding include a requirement for written reports from specialists.

RECOMMENDATION

The resident on whose behalf the application is being made should be copied on all correspondence from the Committee.

Application Form

Section G of the Committee information sheet provides information about the application requirements in the *Regulation*. The information provided is clear and comprehensive. However, there is no stand-alone application form designed specifically for the types of requests for funding that the Committee has been established to consider.

A stand-alone application form would provide comprehensive guidelines in a single document. Such a form could contain information similar to that provided in the Committee information sheet, and could provide a complete and clear explanation of the requirements established in Sections 1(2) and 2 of the *Regulation*.

RECOMMENDATION

The Committee should work with the Department to create a stand-alone application form specific to the types of out of country funding requests the Committee is mandated to consider.

RECOMMENDATION

The stand-alone application form should be easily accessible on the Department website and should also be available in hard copy. The Committee information sheet and the Out-of-Country Health Services Regulation should also be easily accessible on the Department website.

Pre-Hearing Correspondence

A letter is sent out from the Committee Chair acknowledging receipt of the application and providing information about next steps. In the files reviewed during this investigation, there was no written caution in any correspondence that if the resident chooses to go out of country for a health service before the Committee has made its decision, the resident may be responsible for all or most of the costs unless the Committee approves the request for funding.

The Committee Chair should explain this possible limitation to funding in order that the resident has a full understanding of the potential financial responsibility he or she may incur if they choose to obtain a health service before the Committee makes a decision to either approve or not approve funding.

RECOMMENDATION

The Committee Chair should provide a written caution in the acknowledgement letter of the possibility the resident may be liable for the costs of the health service if he or she obtains the service out of country prior to the Committee making a decision.

COMMITTEE CHAIR'S SCREENING ROLE

Section 7 of the *Regulation* establishes a screening role for the Committee Chair to ensure that the application meets the requirements of the *Regulation* and that the application is complete prior to going to the Committee. A letter is sent to the applicant by the Committee Chair or the person designated

"To this end, the committee has conducted a preliminary review of the information provided and as a result, is requesting the following additional information to complete the application requirements."
(from a Committee letter)

by the Committee Chair, when further information is required before the application is declared complete. The Committee Chair or the individual designated by the Committee Chair may request any additional information that he considers necessary to complete the screening process. In the files reviewed during this investigation, the letters sent by the Committee Chair contain plainly worded explanations of the documentation that is required.

When the Committee Chair requests additional information, it has been the practice to advise that the Committee has conducted a preliminary review and is requesting additional information. The correspondence generated by the Committee Chair in carrying out the screening role is administratively unfair when it states the Committee has made a determination it requires further information. In fact it is the Committee Chair's role to make that determination.

RECOMMENDATION

The letter from the Committee Chair requesting that further information be submitted before the application can be considered to be complete, should state it is the Committee Chair who is requiring the information in accordance with Section 7 of the Out-of-Country Health Services Regulation.

HEARING PROCESS

Once the Committee Chair has declared the application complete and provided notification to the applicant of the hearing date, packages for each of the Committee members are prepared by the Administrative Assistant. Those packages contain copies of all the applications to be reviewed at the next scheduled hearing of the Committee. Those packages are couriered to each member of the Committee approximately 10 days prior to the scheduled hearing date, giving the member an opportunity to review each application. The members then convene to consider each application. When the review of each application is complete, the members make a decision which is conveyed by the Committee Chair in writing to the applicant.

Requests for In-Person Hearings

Administrative fairness does not require that committees such as this one conduct in-person hearings, as long as an individual has knowledge of all the evidence used in making a decision and has the opportunity to respond to it.

The Committee's practice is to conduct documentary reviews only. The Committee has received requests for in-person hearings most often from the resident. These requests can either be verbal or in writing. There is no requirement in the *Regulation* for the Committee to hold in-person hearings.

The investigation found the Committee did not always respond to written or verbal requests for the opportunity to appear and make an in-person presentation to the Committee. Failure to respond in writing to these requests is administratively unfair.

RECOMMENDATION

The Committee should develop a policy for responding in writing to all requests for in-person hearings and provide an adequate explanation of its practice.

DECISION MAKING PROCESS

In reviewing the Committee's decision making process, a number of findings of administrative unfairness were noted. The findings are discussed in more detail as follows.

Preliminary Matters to be Addressed at the Hearing

In any administrative tribunal process, there are preliminary matters that need to be addressed at the hearing, including:

- the tribunal's authority to hear the matter;
- correct identification of the issue before the tribunal; and
- conflicts on the part of the tribunal members have been declared.

"There were no real specific details of what they did or what information they used to come to an informed decision."
(from a resident's letter)

Authority to Hear

The first step for an administrative tribunal in considering a matter before it is to determine whether it has authority to hear the matter. A consideration in assessing its authority to hear a matter is for the tribunal to determine whether a party has met any relevant limitation periods.

Section 2(2) of the *Regulation* establishes two different limitation periods for submitting an application to the Committee, depending upon the type of health service to which the application relates. Under Section 2(2)(a), an application for elective services must be made prior to receiving the services. Under Section 2(2)(b), an application for non-elective services may be made either before receiving the services, or not later than 365 days after receiving the services. It must be physicians on the Committee who make the clinical judgment as to whether a service is elective or non-elective. The Committee does not have the authority under the *Regulation* to extend the Section 2(2) limitation periods for filing an application.

In three of the files reviewed in this investigation, the Committee heard and decided applications for funding for non-elective services where the applications for funding were submitted well outside the 365 day limitation period set out in Section 2(2)(b) of the *Regulation*. The Committee, therefore, had no legislative authority to review the merits of those applications. The Committee acknowledged its lack of authority, but proceeded to review and make decisions on the applications.

As an example, in a decision rendered in 2008, the Committee cited the following reasons for its decision to deny an application:

> The requested services were received in April 2004. It was determined that your application was made later than 365 days after the services were received. Expertise for evaluation and management of your condition was/is available in Alberta and elsewhere in Canada. The Committee is aware that there may be a wait list to access such services, depending on an individual patient's medical circumstances; however it is also cognizant that it is the medical professionals involved in the care of their patients who determine which cases need

to be dealt with on a priority basis. Physicians monitor and revise waiting lists depending on a patient's condition and changing medical status.

RECOMMENDATION

As a preliminary step, the Committee should determine its authority to review an application taking into account the limitation periods for submitting an application established in Section 2(2) of the Out-of-Country Health Services Regulation, and if the applicable limitation period has not been met, the Committee should decide that it has no authority to review the application and should, therefore, not proceed to make a decision on the merits of the funding request.

Identification of Issues

When the issue under consideration has been correctly identified, the person reading the decision can be satisfied the decision maker has focused on what he or she has been asked to decide. In the decision letters reviewed during this investigation, the Committee identified the issue it was being asked to decide in an administratively fair manner.

Declaration of Conflicts

When individual members have declared a conflict of interest, these declarations are not noted in the Committee decision letters. Failure to deal with declared conflicts of interest in decision letters is administratively unfair.

RECOMMENDATION

The Committee should address all preliminary matters that have arisen which includes identifying conflicts of interest, in the decision letter.

Identification of Decision Makers

It is a well-established principle of administrative fairness that a person is entitled to know who made the decision which directly affects him or her.

In the majority of the 186 decisions reviewed during this investigation, the Committee members who decided the matter were not identified in the decision letter. In rare circumstances when a person requested the names of the members, those names were provided.

The failure to identify the decision makers in the decision document is administratively unfair. Decisions must be made by impartial and independent decision makers. The only way a person can make a determination that a decision maker was impartial and independent is by knowing the identity of the decision maker.

RECOMMENDATION

The Committee should identify by name those members who participated in the decision regarding funding of out of country health services, in the decision letter.

Chain of Legislative Authority

A person is entitled to a clear explanation of the legislation, regulation or policy that gives the decision maker its authority and is relevant to the decision being made as well as an explanation as to how it was applied in the specific case. In the interests of transparency, it is critical that decision makers provide adequate references to the legislation on which they based their decision.

There was a distinct difference between the letters from the Committee that approved funding and those that denied funding in the decisions reviewed during this investigation. In the denial letters, the relevant legislation was cited. In the approval letters, there was no reference to the legislation which guided the decision.

The Committee should, in every decision letter, state that its authority comes from the *Regulation* and should provide reference to the specific provisions of the *Regulation* that it applied in making its decision. For example, when the Committee states in a decision letter that it has decided to approve or not approve funding for the health service being applied for, it should state the decision is being made pursuant to Sections 8(1)(a) and 8(1)(b) of the *Regulation*. As another example, if the Committee decided that the service being applied for is experimental or applied research, it should state that it may not approve funding as per Section 8(2)(c) of the *Regulation*.

RECOMMENDATION

The Committee should identify the relevant sections of the Out-of-Country Health Services Regulation that establishes the Committee's authority, and that it applied in making its decision, in every decision letter.

Protection of Participation Rights

Participation rights are protected when the decision makers disclose the evidence being considered and the person has the opportunity, prior to the decision being made, to respond to the evidence before the decision makers.

The most common type of evidence in front of the Committee is that which has been submitted either in the initial application or as the result of a request for additional information from the Committee Chair. The material in the packages sent to the Committee members usually consists of evidence submitted in support of the application.

"There was no disclosure to me of any of the advice or 'evidence' they had on file against my claim."
(from a resident's letter)

However, if the Committee does not believe it has sufficient evidence to make a decision, Section 8(3) of the *Regulation* gives the Committee the ability to collect evidence from other sources when it states the Committee may:

> ...consult with health specialists in respect of the matter under its consideration before it renders its decision under subsection (1).

Evidence obtained during the consultation process is not always shared with the applicant by the Committee before the hearing. As a result, the applicant has no opportunity to respond to it.

RECOMMENDATION

The same package of information that is distributed to all Committee members should be provided to the applicant, as well as notice of the date the Committee will be hearing the application. The applicant must be provided with an opportunity to respond to any evidence to be reviewed by the Committee.

"It is the Committee's knowledge that expertise to assess and treat your condition is available in Alberta and elsewhere in Canada."

(From a Committee letter)

Provision of Adequate Reasons

Providing reasons for decision promotes fair and transparent decision making. Without adequate reasons, a person may not understand why the decision maker made an adverse decision. Bodies to which the decision may be appealed, such as the courts or another tribunal, will also have difficulty understanding the rationale for the decision.

It is not sufficient for a decision maker simply to outline the evidence and argument and state his or her conclusions, nor to merely repeat the applicable statutory provisions. That does not reveal the rationale for the decision. With respect to each important conclusion of fact, law and policy, the reasons should explain why the decision maker reached each conclusion. There must be a rational connection between the evidence presented and the conclusions reached by the decision maker. The decision and the reasons must be communicated clearly and identified by the decision maker.

In order to provide adequate reasons, a decision maker must establish findings of fact and the rationale for the decision.

Findings of Fact

A decision maker must find the facts based on the evidence that it reviewed. In making its findings of fact, a decision maker reviews the evidence before him or her, assesses the relevancy of the evidence and decides how much weight to place on each piece of evidence. Reasons for decision should state the findings of fact that support each conclusion reached in the decision, and identify the evidence on which the findings of fact are based.

In the majority of decisions reviewed in this investigation, the Committee did not establish any findings of fact in its decision. The failure to state the findings of fact makes it impossible to determine what evidence the Committee considered, how it assessed the relevancy of the evidence before it, which evidence the Committee accepted and rejected, and ultimately which evidence the Committee relied on in making its findings of fact and reaching its conclusions. This failure also makes it difficult for appeals to be structured and for the Appeal Panel to understand the rationale for the decision.

The failure to make findings of fact constitutes an administrative unfairness.

RECOMMENDATION

The Committee should indicate how it assessed the evidence before it and state its findings of fact based on the evidence it reviewed, in the decision letter.

Rationale for Decision

This investigation found that a common frustration expressed by individuals was a lack of explanation by the Committee in its decision letters for the conclusions it reached. This was particularly the case with respect to two common conclusions reached by the Committee and the corresponding lack of explanation in each case:

- Cases where there was a perception or the evidence submitted was that the health services were not available in Alberta or Canada at all, but the Committee concluded that the health services were available in Alberta or Canada without advising where and/or by whom such services could be obtained and how the Committee determined this finding.
- Cases where there was a perception or the evidence submitted was that although the health services were available in Alberta or Canada, the time period required to wait for the health services was not reasonable for the resident, but the Committee either merely concluded that the health services were available in Alberta or Canada, or it added that wait times for services are determined by the resident's physician depending on the resident's condition and changing medical status.

To place the issue in its legislative context, Section 8(2)(b) of the *Regulation* states that the Committee may not approve payment for services provided outside Canada if the services are available in Canada.

Section 1(2) of the *Regulation* provides that a service is available in Canada if the resident could have obtained the service in Canada **within the time period generally accepted as reasonable by the medical or dental profession for any person with a similar condition**.

Each of the above scenarios is discussed in detail below.

Health Services Are Available In Alberta Or Canada

As set out above, numerous decisions of the Committee concluded that the health service in question was available in Alberta or Canada, but the Committee did not explain what evidence it relied on to reach that conclusion or otherwise provide any rationale for the conclusion. In some of these cases, there was a perception or evidence submitted to the Committee indicated that the health service in question was not available in Alberta or Canada at all.

Based on interviews with the Committee members and the Committee Chair, this investigation determined that as specialists in their fields, the Committee members often either possess the required knowledge about the availability of the health services in question, or they are able to obtain information about availability from their medical colleagues. In cases where the Committee considers either or both of these sources of information in reviewing the application, that information constitutes evidence the Committee considered in making its decision.

In cases where the Committee relied on its own knowledge or on information obtained from colleagues about the availability of the service in Alberta or Canada and concluded that the service was available in Alberta or Canada, the Committee was, in essence, placing more weight on this evidence than it placed on the evidence submitted that the service was not available. As such, the onus of proving the service was unavailable had not been met. However, the Committee routinely failed to explain the rationale it used to arrive at its conclusion that the service was available.

In a large number of the decisions reviewed where the decision was to deny the funding request, the Committee would state, for example, that "expertise and treatment for your condition is available in Alberta and elsewhere in Canada, although it may not be the technique and/or particular treatment you prefer." This is an insufficient explanation as it is impossible to determine to what the Committee is referring and the evidence on which it based its decision.

Health Services Are Available In Alberta Or Canada Within A Reasonable Time Period

In a significant number of its decisions dealing with whether the health services in question are available in a reasonable time period, the Committee merely concludes that it is satisfied the particular health service is available in Alberta or Canada. On other occasions, the Committee concludes that an assessment of whether a service is reasonably available will be dependent on the assessment of the individual patient by the physician who will then prioritize the treatment.

In some decisions, the Committee expanded on that to address waiting lists specifically. For example:

> It is the Committee's knowledge that the requested services are available in Alberta and elsewhere in Canada. The Committee is aware that there may be a wait list to access such services, depending on an individual patient's medical circumstances; however it is also cognizant that it is the medical professionals involved in the care of their patients who determine which cases need to be dealt with on a priority basis. Physicians monitor and revise waiting lists depending on a patient's condition and changing medical status.

The test in deciding whether a health service is available or not in Canada in Section 1(2) of the *Regulation* is whether the service could have been obtained in a time period considered reasonable by the medical profession when compared to others with a similar condition. There is an onus to show the wait time that exists at the time of the application for the service is not reasonable for a person with the same medical condition as the resident. The Committee must consider any evidence submitted that the wait time is unreasonable, along with any other evidence the Committee has about the reasonableness of the wait time, and determine whether the required onus has been met.

As explained above, other evidence may include the Committee's own knowledge or information obtained from colleagues about the reasonableness of the wait time given the resident's circumstances. In

order to demonstrate a wait time is unreasonable, a resident would ideally want to provide evidence from his or her physician that the soonest the resident could receive the service, based on prioritizing the resident, would be unreasonable given the resident's condition.

Regarding both scenarios discussed above, this investigation found that the Committee rarely identified the evidence it considered regarding availability and reasonableness of the wait time and how it weighed that evidence to make its decision. Essentially there was, in the majority of Committee decisions, no connection between the evidence on file and the decision. The decisions did little more than state the conclusions reached by the Committee. This constitutes an administrative unfairness.

This creates substantial problems in attempting to formulate an appeal request if there is dissatisfaction with the Committee decision and the resident desires to appeal the decision to the Appeal Panel. The problem is the same for the members of the Appeal Panel who are unable to determine what the Committee considered in making its decision.

In order for a Committee decision to be administratively fair and transparent, it must set out its findings of fact, indicating the evidence the Committee considered and how it weighed the evidence in reaching its conclusion that the service is available in Alberta or Canada, and that it is available in a reasonable time period given the resident's condition. Specifically, if the Committee makes a finding based on the evidence it considered that a particular physician or physicians in Alberta or Canada, or a particular medical centre in Alberta or Canada provides the service, in order to be administratively fair, the Committee must set out this evidence in its decision so that the basis for the decision can be understood.

"There is no evidence in the documentation provided to indicate that you have been assessed by an orthopaedic surgeon and/or neurosurgeon."
(from a Committee letter)

During this investigation, the Committee voiced the ethical concern that setting out in a decision letter the names of physicians who perform particular procedures would constitute a medical referral and/or be perceived as a medical referral by those reading the decision. There was not a similar concern expressed about setting out names of medical centres that provide certain health services.

In order to address that concern, the Committee might consider preparing a standard proviso that would be included in all decision letters where physicians' names are included in the discussion of evidence the Committee relied on in concluding the service was available. Such a proviso could state that the reference to the physician does not in any way constitute a medical referral and could indicate the process that must be followed in order to obtain a medical referral.

RECOMMENDATION

The Committee should explain the rationale for its decision by making a connection between the evidence presented and the conclusion it reached, in the decision letter.

RECOMMENDATION

Where the Committee concludes that the health services for which funding is being requested are available in Alberta or Canada based on evidence

before it that a particular physician(s) or medical centre(s) in Alberta or Canada provides the health services, the Committee should provide the name(s) of the physicians(s) and/or medical centre(s), as the case may be, in the decision letter. The decision letter should contain a proviso that the list provided shall not constitute a medical referral.

RECOMMENDATION

Where the Committee concludes that the health services for which funding is being requested are available in Alberta or Canada in a reasonable time period given the resident's condition, the Committee should outline the evidence it relied on in arriving at that conclusion, in the decision letter.

Identification of Available Avenues of Appeal

If there are statutory appeal rights, a decision maker is acting in an administratively fair manner when it outlines those appeal rights.

Section 8(5)(b) of the *Regulation* states:

> The OOCHSC [the Committee] shall, within 10 days of making a decision under subsection (1), excluding Saturdays, Sundays and holidays, send notice of the right to appeal the decision to the applicant and, if the applicant is a person referred to in section 2(4), to the resident on whose behalf the application is made.

The Committee outlined the available avenue of appeal to the Appeal Panel and provided relevant contact information in every case where the decision was to deny funding.

In almost no case where the Committee approved funding, did it outline appeal rights. Many of the Committee decisions approving funding set terms for funding or approved funding for only a portion of the requested health service. There may be disagreement with the content of these decisions.

The Committee is required to send a notice of the right to appeal with every decision letter. Therefore, the failure to provide this notice in all decision letters is administratively unfair.

RECOMMENDATION

The Committee should include a notice of the right to appeal, as required by the Out-of-Country Health Services Regulation, in every decision letter.

HANDLING OF POST-DECISION EVIDENCE SUBMISSIONS

An administrative tribunal does not have inherent power to reconsider a decision after it has been made. The power to reconsider must be expressly granted by legislation. The *Regulation* does not provide any express power to the Committee to reconsider or rehear a decision the Committee has made.

This investigation found there were inconsistencies on the part of the Committee as to how it handled evidence that was submitted after a decision was made. In one case where a resident submitted new evidence to the Committee after it issued its decision, the Committee treated the evidence

as a new application without expressly calling it a new application, and made a second decision. In another case where a resident submitted new evidence and requested a reconsideration the Committee responded that it had no power to rehear or reconsider matters it has previously dealt with. This inconsistency is administratively unfair.

The Committee should have in place written policy to deal with the situation where new evidence is submitted for consideration by the Committee after the Committee has made a decision. The policy should explain the Committee's authority and process for handling new evidence received after a decision has been made.

RECOMMENDATION

The Committee should develop written policy on how to handle new evidence that is submitted after the written decision is issued.

TRAINING

This investigation found the only training provided to the Committee members was a two and a half hour presentation delivered to the Committee members in spring 2007 by legal counsel to the Appeal Panel.

It is recognized Committee members bring a wealth of medical expertise and professional knowledge to the decision hearing. However, Committee members should receive training to enhance their decision making skills in an administrative tribunal setting. Regarding decision writing, the members do not typically write the decisions that are issued by the Committee. That responsibility rests with the Committee Chair and training to enhance decision writing skills is essential for the Committee Chair.

RECOMMENDATION

The Committee Chair should make it mandatory for the members to receive training and ongoing education which enhances their roles as decision makers and decision writers as members of an administrative tribunal. The Committee Chair should receive training to enhance decision writing skills.

I. OVERVIEW

Section 11(2) of the *Regulation* states the Appeal Panel consists of six members appointed by the Minister of Health and Wellness. Four of the members are to be physicians, and of the remaining two, one must be an ethicist and one must be a member of the general public. Quorum for any hearing of an appeal is three members and the *Regulation* requires that either the ethicist or the public member be in attendance. The Minister has designated one of the physician members as Appeal Panel Chair, in accordance with the terms of Section 11(4) of the *Regulation*.

Section 13(1) of the *Regulation* establishes the authority of the Appeal Panel to hear appeals of Committee decisions as follows:

> The Appeal Panel shall review the applicant's application and the OOCHSC's [the Committee's] decision if a notice of appeal is received within 60 days of the appellant receiving the decision under section 8.

Section 13(2) of the *Regulation* establishes that the Appeal Panel can only review the written decision and reasons of the Committee and the material attached to the application or obtained by the Committee prior to making its decision. That Section also states the Appeal Panel "shall not review any new evidence."

Section 13(4) gives the Appeal Panel the power to "confirm or vary the decision of the OOCHSC [the Committee] or substitute its decision for the OOCHSC's [the Committee's] decision." Section 13(5) states that if the Appeal Panel confirms, varies or substitutes its decision for that of the Committee, the "Minister shall pay for those services approved by the Appeal Panel."

According to figures provided by the Department, 128 of the 204 applications that were denied between March 2004 and November 2008 by the Committee were appealed. The Appeal Panel overturned the Committee decision on 25 of those applications and approved them for funding.

PROCESSING OF APPEALS

The Administrator for the Appeal Panel (the Administrator) is an employee of the Department who carries out the administrative functions and activities of the Appeal Panel. This includes coordinating the appeals and managing a filing system that is separate from the Department's and the Committee's filing system.

All appeal applications are received by the Administrator who contacts the Committee to request a complete copy of the Committee file. The Administrator coordinates the hearing dates and forwards copies of the appeal application to each of the Appeal Panel members, including the Appeal Panel Chair. The Administrator notifies the appellant verbally of the receipt of the notice of appeal and that it will be heard at the next available date that the Appeal Panel sits.

Section 13(3) of the *Regulation* requires the Appeal Panel to decide the appeal within 60 days of receipt of the notice of appeal. The hearings are documentary reviews only. Under Section 13(6) of the *Regulation*, the Appeal Panel must, within 10 days of making its decision, send a written copy of its decision with reasons to the Minister, each member of the Committee, and the appellant. The written decisions are signed by the Appeal Panel Chair.

II. FINDINGS AND OBSERVATIONS

RECRUITMENT/APPOINTMENT

To be administratively fair, the recruitment process must be transparent, open and competency-based. The Public Agencies Governance Framework, February 2008, adopted by the Government of Alberta which "focuses on promoting good governance of the province's agencies, boards and commissions," supports this premise, at page three of the document.

The members of the Appeal Panel, including the Appeal Panel Chair, are appointed by Ministerial Order. The terms of these appointments will expire at different times over the next four years. The timing of these appointments provides for continuity and retention of experience of Appeal Panel members.

The two most recent appointments were the Appeal Panel Chair and an Appeal Panel member. This investigation found there was no advertising for the vacant position of Appeal Panel Chair. This results in a lack of openness and transparency when vacancies of this nature occur and are not publicly advertised. This is administratively unfair.

Subsequent to the Appeal Panel Chair's appointment, there was advertising for the vacant physician member's position. The recruitment process was managed by staff in the Department. This investigation found that a Department staff member was involved in the interview process for the new member to the exclusion of any representation from the Appeal Panel. This could be perceived as impinging on the independence of the Appeal Panel when Department staff is involved in the interview process.

The Department has not given any consideration to involving the Appeal Panel Chair or a physician member of the Appeal Panel in an interview with the prospective physician member. When a physician is being recruited, it is imperative to involve a physician member of the Appeal Panel in the interview process to enhance the goal of competency-based recruiting. The Department needs to be mindful of its role in providing administrative support only in this process.

Two members of the Appeal Panel are non-physician appointments. It should be part of the roles and responsibilities of the Appeal Panel Chair to be involved in the interview process of the non-physician members.

RECOMMENDATION

The Appeal Panel should ensure recruitment of members follows an open and transparent process by advertising for all vacancies.

RECOMMENDATION

The Appeal Panel Chair should ensure that when a physician is being recruited to the Appeal Panel, there should be a physician member on the interview panel to enhance the goal of competency-based recruiting. When a non-physician member is being recruited to the Appeal Panel, the Appeal Panel Chair should be on the interview panel.

ORIENTATION

The goal of orientation should be to provide the new members of the Appeal Panel with complete information about their roles and responsibilities as members of an administrative tribunal.

When the new Appeal Panel Chair was appointed, this investigation found an orientation was done by the Administrator and the Executive Director of the Client Services Branch of the Department. The new Appeal Panel Chair was provided with a binder containing a copy of the *Regulation*, a list of the Appeal Panel members, a document entitled "Terms of Reference for the Out of Country Health Services Appeal Panel" dated June 11, 1996, copies of template letters in use by the Appeal Panel, and information on the Appeal Panel's administrative processes, including information on the remuneration claim process. The binder also contained a document entitled "The Write Stuff" dated May 2007, written by legal counsel for the Appeal Panel, which provides information about decision writing.

Orientation of the newest member was done by teleconference with the Administrator. The member received a copy of the same binder that was issued to the Appeal Panel Chair. To date, the current Appeal Panel Chair has not met with her or been involved in the orientation process.

RECOMMENDATION

The Appeal Panel should ensure its orientation program provides complete information on roles and responsibilities of the Appeal Panel and its members. Orientation should be conducted by individuals qualified to provide such orientation.

APPEAL HEARING PROCESS

Appeal packages for each of the members and the Appeal Panel Chair are prepared by the Administrator. These packages contain copies of the letter of appeal and the Committee file for each person who has filed an appeal. Those packages are couriered to each member of the Appeal Panel seven to 10 days prior to the scheduled hearing date, giving the members an opportunity to read and review each appeal.

The members then hold a hearing, most of the time by teleconference. At the end of the discussion of each appeal, pursuant to Section 12 of the *Regulation*, the members including the Appeal Panel Chair vote and by majority render a decision of the Appeal Panel. The Appeal Panel Chair sends the decision in writing to the appellant.

PRE-DECISION EVIDENCE

Section 13(2) of the *Regulation* sets out the parameters of what the Appeal Panel can review and establishes that the Appeal Panel has no authority to review new evidence.

This investigation found if an appellant sends in documents that the Administrator considers to be new evidence, it is the current practice of the Administrator to verbally advise the appellant the material is new evidence and that the Appeal Panel has no authority to consider the evidence. The

Administrator gives the appellant the option to have the material returned. The Administrator will advise the appellant that if the appeal is unsuccessful, the new evidence may be presented to the Committee in the form of a new application.

Neither the Appeal Panel Chair nor the Appeal Panel are involved in making decisions about whether material submitted should or should not be considered new evidence. The Administrator, by making decisions about new evidence, is making decisions that the Appeal Panel is required to make pursuant to Section 13(2) of the *Regulation*. That is an administrative unfairness.

RECOMMENDATION

Only the Appeal Panel should decide whether any information and/or evidence submitted by an appellant to the Appeal Panel is considered to be new evidence. The decision of the Appeal Panel should be in writing to the appellant.

DECISION MAKING PROCESS

In reviewing the Appeal Panel's decision making process, a number of findings of administrative unfairness were noted. The findings are discussed in more detail as follows.

Preliminary Matters to be Addressed at the Hearing

In any administrative tribunal process, there are preliminary matters that need to be addressed at the hearing, including:

- the tribunal's authority to hear;
- correct identification of the issue before the tribunal; and
- conflicts on the part of the tribunal members have been declared.

Authority to Hear

Section 13(1) of the *Regulation*, establishes that a notice of appeal must be received by the Appeal Panel within 60 days of the appellant receiving the Committee's decision. The Appeal Panel does not have the authority under Section 13(1) of the *Regulation* to extend the 60 day limitation period for submitting a notice of appeal.

This investigation found that in a number of appeals, the notice of appeal was received by the Appeal Panel outside the 60 day limitation period. The Appeal Panel, therefore, had no legislative authority to consider those appeals, but proceeded to decide the appeals in any case.

If the Appeal Panel determines it has no authority to consider an appeal, it is administratively unfair for the Appeal Panel to proceed to make a decision on the merits of the appeal.

RECOMMENDATION

As a preliminary step, the Appeal Panel should determine its authority to hear the appeal taking into account the limitation periods established

in Section 13(1) of the Out-of-Country Health Services Regulation. If the limitation period has not been met by the appellant, the Appeal Panel should decide that it has no authority to consider the appeal and should, therefore, not proceed to make a decision on the merits of the appeal.

Identification of Issues

When the issue under consideration has been correctly identified, the person reading the decision can be satisfied the decision maker has focused on what he or she has been asked to decide. In decision letters, the Appeal Panel must address the issues that were before the Committee. In all the Appeal Panel files reviewed during this investigation, the Appeal Panel identified the issue of appeal in an administratively fair manner.

Declaration of Conflicts

When individual members have declared a conflict of interest, these declarations are not noted in the Appeal Panel decision letters. Failure to deal with declared conflicts of interest in decision letters is administratively unfair.

RECOMMENDATION

The Appeal Panel should address all preliminary matters that have arisen which include conflicts of interest, in the decision letter.

Requests for In-Person Hearings

Administrative fairness does not require that administrative tribunals conduct in-person hearings, as long as an individual knows all the information considered in making a decision and has the opportunity to respond to it. There is no requirement in the *Regulation* that the Appeal Panel hold in-person hearings. The Appeal Panel's practice is to conduct documentary reviews only.

This investigation found the Appeal Panel did not always respond to written requests from appellants for the opportunity to appear and present their case in-person to the Appeal Panel. It is administratively unfair not to respond to such requests.

RECOMMENDATION

The Appeal Panel should develop a policy for responding in writing to all requests for in-person hearings and provide an adequate explanation of its practice.

Identification of Decision Makers

A principle of administrative fairness is that a person is entitled to know who made the decision that has a direct effect on him or her. Decisions must be made by impartial and independent decision makers. The only way an appellant can make a determination that a decision maker was impartial and independent is by knowing the identity of the decision maker.

The Appeal Panel was inconsistent in identifying the names of the members who heard the appeal. In the 122 Appeal Panel decisions reviewed during this investigation, there were only 16 decisions where the names of the members who heard the appeal were identified.

The failure to identify the decision makers in the decision document is administratively unfair.

RECOMMENDATION

The Appeal Panel should identify by name the members who participated in the decision regarding funding of out of country health services, in every decision letter.

Chain of Legislative Authority

A person is entitled to a clear explanation of the legislation, regulation or policy that gives the decision maker its authority and is relevant to the decision being made as well as an explanation as to how it was applied in the specific case. In the interests of transparency, it is critical that decision makers provide adequate references to the legislation on which they based their decision.

Section 13(4) of the *Regulation* gives the Appeal Panel the authority to confirm or vary the decision of the Committee or substitute its own decision for that of the Committee. This investigation found the Appeal Panel decision letters were not consistent in citing the current governing legislation. Of the 19 decisions where the Appeal Panel cited the governing legislation, in 16 of those decisions it referred to the outdated 1981 *Alberta Health Care Insurance Regulation* instead of the current 2006 *Out-of-Country Health Services Regulation*.

RECOMMENDATION

The Appeal Panel should cite the current 2006 Out-of-Country Health Services Regulation, which establishes the Appeal Panel's authority, in every decision letter.

Protection of Participation Rights

Participation rights are protected when the decision maker discloses the evidence that will be considered and a person has the opportunity, prior to the decision being made, to respond to the evidence before the decision makers.

In the majority of the Appeal Panel decisions reviewed, there was inadequate disclosure of the evidence that was to be considered by the Appeal Panel in making its decision.

It is the practice of the Appeal Panel to indicate it reviewed the evidence that was made available to it by the Committee and/or that it reviewed the material the appellant had provided to the Appeal Panel. There are decisions where the Appeal Panel did not identify any evidence it had in front of it, and there are other decisions where the Appeal Panel stated it reviewed documents provided by the appellant.

The Appeal Panel makes inconsistent reference to the documentation that was in front of it. This is administratively unfair.

RECOMMENDATION

The Appeal Panel should clearly identify that it considered all the file material that was in front of the Committee, the decision letter of the Committee, as well as the letter of appeal, in the decision letter.

Provision of Adequate Reasons

Providing reasons for decisions promotes fair and transparent decision making. Without adequate reasons, an appellant may have to speculate why the decision maker made an adverse decision. Bodies to which the decision may be further appealed or reviewed, such as the courts or the Ombudsman, will have difficulty understanding the rationale for the decision.

It is not sufficient for a decision maker simply to outline the evidence and argument and state his or her conclusions, nor to merely repeat the applicable statutory provisions. That does not reveal the rationale for the decision. With respect to each important conclusion of fact, law and policy, the reasons should explain why the decision maker reached each conclusion. There must be a rational connection between the evidence presented and the conclusions reached by the decision maker. The decision and the reasons must be communicated clearly and identified by the decision maker.

In a number of investigations conducted by the Ombudsman prior to the commencement of this own motion investigation, there were inadequate reasons provided which would enable the appellant to understand why the appeal request was denied. Mr. Justice Sirrs in the McGregor decision at paragraphs 39 and 40, reached a similar conclusion:

> In my view, the reasons of the Appeal Panel are obscure and at best could be said to adopt the reasons of the OOCHSC [the Committee]. These reasons fail to address the grounds of appeal. I find the reasons to be so sorely lacking in substance that they fail to provide Mr. McGregor any understanding why his request for funding was denied.

In order to provide adequate reasons, a decision maker must establish findings of fact and the rationale for the decision.

Findings of Fact

A decision maker must find the facts based on the evidence that it reviewed. In making its findings of fact, a decision maker reviews the evidence before him or her, assesses the relevancy of the evidence and decides how much weight to place on each piece of evidence. Reasons for decision should state the findings of fact that support each conclusion reached in the decision, and identify the evidence on which the findings of fact are based.

In the McGregor decision, Mr. Justice Sirrs noted the failure of the Appeal Panel to cite any findings of fact at paragraph 36: "No attempt was made to recite any facts upon which the Appeal Panel relied."

The majority of the decision letters of the Appeal Panel reviewed during this investigation failed to establish any findings of fact. That is an administrative unfairness. The failure to state the findings of fact makes it impossible to determine what evidence the Appeal Panel considered, how it assessed the relevancy of the evidence before it, which evidence the Appeal Panel accepted and rejected, and ultimately, which evidence the Appeal Panel relied on in making its findings of fact and reaching its conclusions.

RECOMMENDATION

The Appeal Panel should indicate how it assessed the evidence before it and state its findings of fact based on the evidence it reviewed, in the decision letter.

Rationale for Decision

As recently as two years ago, the written decisions of the Appeal Panel were simply statements of conclusion. There was no rationale provided for the decision, nor was there any demonstration of how the evidence was weighed.

In 2007, Mr. Justice Sirrs in the McGregor decision found at paragraph 34:

> In my view, all six grounds of appeal of the applicant warranted a response from the Appeal Panel together with the reasoning behind their acceptance or rejection of the grounds of appeal. At the very least, the Appeal Panel should have provided its reasoning behind a determination that Dr. Birch's procedure was not unique and why any number of orthopaedic or neurological surgeons could have done the surgery.

Since the McGregor decision was rendered, the written decisions of the Appeal Panel have moved towards providing some rationale; however, some of the inadequacies noted by Mr. Justice Sirrs are still occurring in the more recent decisions of the Appeal Panel.

There have been decisions, particularly in relation to the issue of wait times, where the Appeal Panel has provided some rationale for its decision to deny the appeal. The following is an example:

> Though the procedure and/or its timing is not necessarily as you would wish, it is up to your local orthopaedic consultant to prioritize his or her wait lists to accommodate patients as changing circumstances may dictate.

In many cases there is no connection between the evidence presented and the conclusions reached by the Appeal Panel. In the majority of decision letters, there is no explanation of how the evidence was weighed or why one piece of evidence was given more weight than another. On the issue of availability of health services, the Appeal Panel has made similar conclusions to that of the Committee, without providing any information as to how it arrived at that finding.

In fairness to the Appeal Panel, when the Committee does not provide a rationale or provides very little rationale for its decision in the decision letter, it is almost impossible for the Appeal Panel to determine the basis for the Committee decision.

"It was stated by him that there are specialists for my condition in Calgary and Canada; however, he never gave me names of any of these specialists."
(from a resident's letter)

RECOMMENDATION

The Appeal Panel should be consistent in explaining the rationale for its decision by making a connection between the evidence presented and the conclusion reached, in every decision letter.

Arguments

Administrative fairness requires that a decision maker show how major arguments were dealt with. Not every argument needs to be addressed; however, there is a requirement that major arguments be responded to.

A common argument noted in many of the Appeal Panel files reviewed during this investigation was that the appellant could not find a physician or a health centre in Alberta or Canada to perform the requested health service even though the Committee had said in its decision letter the service was available in Alberta or Canada. Another common argument was that while the appellant acknowledged the service was available in Alberta or Canada, it was not available in a timely manner. It was common for the Appeal Panel to reiterate the statements of the Committee that the health service was available in Alberta or Canada but the Appeal Panel usually failed to provide the basis for its findings and specifically respond to the arguments presented.

Failure to address the appellant's major arguments is an administrative unfairness.

RECOMMENDATION

The Appeal Panel should address the major arguments of the appellant, in the decision letter.

DISTRIBUTION OF DECISION LETTERS

Section 13(6) of the *Regulation* requires that the Appeal Panel send a written copy of its decision with reasons to the Minister.

In practice, a copy of the Appeal Panel decision letter is forwarded to the Committee and the appellant. This investigation determined the decision letters are available should the Minister request them, but are not sent to the Minister as required by the *Regulation*.

RECOMMENDATION

The Appeal Panel should comply with the requirement in Section 13(6) of the Out-of-Country Health Services Regulation by sending a copy of the decision letter to the Minister.

TRAINING

This investigation found the only training that has been provided to Appeal Panel members was a session delivered by independent legal counsel to the Appeal Panel in May 2007. There has been no other training for either existing or new members of the Appeal Panel.

As the Appeal Panel consists of specialists in medicine and ethics and a member of the public, its members bring a wealth of professional knowledge and expertise to the appeal hearing. Appeal Panel members need training to enhance their decision making skills in an administrative tribunal setting. The members do not typically write the decisions that are issued by the Appeal Panel. That responsibility rests with the Appeal Panel Chair though on occasion, an Appeal Panel member may be delegated that responsibility. Training to enhance decision writing skills is essential for the Appeal Panel Chair and any member delegated to write decisions.

RECOMMENDATION

The Appeal Panel Chair should make it mandatory for the members to receive training and ongoing education to enhance their roles as decision makers and decision writers as members of an administrative tribunal. The Appeal Panel Chair should receive training to enhance decision writing skills.

ADMINISTRATIVE SUPPORT TO THE APPEAL PANEL

This investigation identified a number of administrative practices that are administratively unfair.

Appeal Panel decisions are written on Department letterhead with the name of the Appeal Panel in a header on the letterhead. The Appeal Panel has an arm's length relationship with the Department. The use of Department letterhead by the Appeal Panel for its correspondence, particularly its decision letters, can create a perception that the Appeal Panel does not operate independently from the Department.

RECOMMENDATION

The decision letters of the Appeal Panel and all Appeal Panel correspondence should be written on Appeal Panel letterhead.

An Appeal Panel information sheet entitled "The Out-of-Country Health Services Appeal Process" (Appendix F) provides information on the appeal process and contact information such as the address and telephone number in order to obtain further information. The telephone number listed on the Appeal Panel information sheet is the telephone number for the Administrator; however, there is no identification in the voice messaging system at that desk to advise a caller that he or she has contacted the correct office for information.

RECOMMENDATION

The voice mail message on the Administrator's telephone should reference not only the Administrator's title with the Department, but also the title as Administrator to the Appeal Panel.

Letters of appeal received by the Appeal Panel in the last three years have not been date stamped. Section 13(3) of the *Regulation* requires the Appeal Panel to make a decision on an appeal within 60 days of receipt of the notice of appeal. The monitoring of the 60 day deadline is done by the Administrator in an informal record keeping process. Since the 60 days is a legislated deadline, it is important that a more formal process be implemented for tracking that deadline.

RECOMMENDATION

All documentation received by the Appeal Panel should be date stamped.

RECOMMENDATION

The monitoring of the mandated 60 day deadline to hear an appeal should be formalized.

A letter of acknowledgement is not sent to appellants confirming receipt of notices of appeal explaining the Appeal Panel process, or explaining that a decision is required to be made within 60 days of receipt of the appeal.

RECOMMENDATION

A letter of acknowledgement should be sent out to every appellant confirming receipt of the appeal and explaining the Appeal Panel process, which includes information about the requirement for a decision to be made within 60 days of receipt of a notice of appeal.

There are no records maintained on the appellant's file of any contacts the Administrator may have had concerning the appeal.

RECOMMENDATION

Any contacts the Administrator has in relation to the appeal should be documented on the appellant's file.

The investigation found that many Appeal Panel decisions have not been filed on the appellant's file. Decision letters should be filed, as the decisions may be subject to review by the courts or by the Ombudsman.

It is administratively unfair to have a completed appeal without a decision letter on file.

RECOMMENDATION

A copy of the Appeal Panel decision should be filed on the appellant's file when the decision is issued to the appellant.

The manual containing orientation materials provided to the Appeal Panel Chair and to the newest Appeal Panel member contains outdated template letters. It contains directions on date stamping of documents as well as a template of a letter of acknowledgement which, as indicated above, is not being used.

RECOMMENDATION

The Appeal Panel binder containing orientation and procedural material should be reviewed and updated on a regular basis.

III. PREVIOUS OMBUDSMAN RECOMMENDATIONS

HISTORY

Of the 10 investigations into complaints involving out of country health services active prior to the commencement of this own motion investigation, there were two investigations where recommendations were made to the Appeal Panel for re-hearing and the Appeal Panel had not provided a response to the Ombudsman when this own motion investigation was publicly announced. Three complaints involving the Committee and the Appeal Panel are under active investigation, and a fourth one involving the Department has been successfully concluded with the Department.

Of the remaining four investigations, recommendations were made that the appeals be re-heard. The Ombudsman's conclusions and recommendations with respect to each of the four investigations and the recommendations are outlined below.

File 1

The Ombudsman's investigation determined the Appeal Panel:

- Failed to explicitly cite the new documentation made available to it
- Failed to explain what the "appropriate treatment" was for the resident's condition and failed to cite the evidence relied on to reach this conclusion
- Failed to explain how it defined the term "available" and failed to cite the medical evidence relied on to make the finding there was appropriate treatment available in Alberta
- Stated the basis for its decision to deny funding was because the surgery had not been endorsed by the specialist medical community without making any direct reference to the medical evidence upon which the Appeal Panel relied
- Failed to show how it weighed the argument that the surgery was endorsed in Canada and specifically how it weighed the apparent incongruent remarks on this issue in the medical documentation before it

File 2

The Ombudsman's investigation determined the Appeal Panel:

- Failed to address the statutory authority of the Appeal Panel and whether the health service in question was an insured hospital service
- Failed to directly address the Committee's decision
- Failed to explicitly cite the extensive documentation made available to it

- Failed to explain its decision that the treatment for the condition was not sought elsewhere in Canada by the resident, and failed to explain the evidence relied on to reach this conclusion
- Failed to cite how it defined the term "available" and failed to cite the medical evidence relied on to make the finding there was appropriate treatment available in Alberta
- Failed to specifically explain what the Appeal Panel meant when it stated the documentation "clearly indicated" the service was available in Canada and failed to explain what this documentation was
- Failed to show how it weighed the arguments in the letter of appeal, specifically the arguments made to refute the Committee's decision

File 3

The Ombudsman's investigation determined the Appeal Panel:

- Failed to address the statutory authority of the Appeal Panel
- Failed to cite the extensive documentation that had been made available to it
- Failed to explain the evidentiary foundation or the criteria it applied for its determination that the health service was available in Alberta and Canada
- Failed to cite how it defined the term "available"
- Failed to weigh any of the medical evidence before it
- Failed to address the major argument set out in the letter of appeal

Three recommendations were made to the Deputy Minister of Health and Wellness as the result of the issues of administrative unfairness that were identified on these three files:

- Re-hear the applications for funding and issue new decisions
- Implement training regarding statutory authority and writing decisions
- Amend the out of country health services information package

DEPARTMENT RESPONSE

Two of the three recommendations regarding training and the content of the information package were accepted and implemented by the Department. The third recommendation to re-hear was turned over to the Appeal Panel Chair in view of the independent nature of the relationship between the Appeal Panel and the Department.

RESPONSES FROM FORMER APPEAL PANEL CHAIR

The former Appeal Panel Chair responded to the recommendations on the three files for re-hearings to indicate the Appeal Panel determined it would not issue new written decisions because:

- There has been considerable passage of time with loss of "corporate memory"
- There has been a change in the composition of the Appeal Panel members over time
- Re-writing the decisions would not be possible without re-hearing, however, circumstances had changed since the original decisions were made and it would be difficult to determine what health services were or were not available at the time the original decisions were made

The Appeal Panel was subsequently asked to reconsider its position by the Ombudsman, but advised its decision to not re-hear these appeals is unchanged.

A series of discussions and meetings ensued with the former and current Ministers of Health and Wellness and the former and current Appeal Panel Chairs. In the meantime, the investigation of the fourth file was completed.

File 4

The Ombudsman's investigation determined the Appeal Panel:

- Failed to cite the statutory authority of the Appeal Panel
- Failed to cite the criteria it applied when it determined that the health services was available in Alberta and Canada
- Failed to cite the extensive documentation that had been made available to it
- Failed to provide reasons for its decision and how it exercised its discretion
- Failed to address the major arguments set out in the letter of appeal
- Failed to cite how it defined the term "available"
- Failed to evaluate the medical evidence in terms of the legislative criteria

A recommendation was made to the Appeal Panel Chair that the appeal be re-heard in view of the number of issues of administrative unfairness that had been identified during the investigation. The current Appeal Panel Chair was also asked to respond to the issues that had been raised by the Ombudsman regarding the recommendations to re-hear in the previous three files.

RESPONSES FROM CURRENT APPEAL PANEL CHAIR

The current Appeal Panel Chair responded to advise the Appeal Panel had convened to review the issues and determined the following in each of the files.

File 1

- Policies and procedures have changed over time and it would be difficult for a new panel to understand the standards in place at the time of the previous decision
- Composition of the Appeal Panel has changed

File 2

- Due to the passage of time, there was little to be gained from a re-hearing
- Essentially by convening to review the matter the Appeal Panel re-heard the matter
- Policies and procedures have changed over time and it would be difficult for a new panel to understand the standards in place at the time of the previous decision

File 3

- Composition of the Appeal Panel has changed
- The new Appeal Panel affirmed the decision of the previous Appeal Panel
- The previous Appeal Panel met the minimum requirements of procedural fairness and natural justice

File 4

- The previous Appeal Panel met the minimum requirements of procedural fairness and natural justice
- The definition of "availability" was properly applied in this file
- It is the responsibility of the attending physician to make a determination as to what is reasonably available
- The previous Appeal Panel properly exercised its discretion in adopting the rationale of the Committee

The administrative errors identified on these four files reflect the types of administrative unfairness identified in this own motion investigation and remain unresolved. As a fair resolution to the administrative errors identified in each of these investigations, the Appeal Panel should re-hear each of the four appeals. The re-hearings should result in written decisions that:

- Identify the legislative authority of the Appeal Panel to hear the matter

- Demonstrate what evidence was reviewed and how it was weighed
- Demonstrate how criteria contained in the *Regulation* was applied
- Address the arguments of the appellants

RECOMMENDATION

The Appeal Panel should conduct re-hearings in the four files as recommended by the Ombudsman.

NOTE: The names of the complainants in these four investigations have been withheld to protect their privacy. The Ombudsman will identify the specific files to the Appeal Panel Chair under separate correspondence.

I. OVERVIEW

INNOVATION AND POLICY BRANCH

The Innovation and Policy Branch (Innovation and Policy) in the Program Services Division of the Department works with the Department in developing policy recommendations related to the Alberta Health Care Insurance Plan and other programs, and assists Albertans who are seeking access to funding for medically required health services not available in Alberta. Innovation and Policy provides an administrative support function to the Committee. Section 4(1)(b) of the *Regulation* states that the Committee Chair shall be an employee of the Department. The Department's Medical Consultant, from Innovation and Policy, is the current Committee Chair.

CLIENT SERVICES BRANCH

The Client Services Branch (Client Services) in the Program Services Division of the Department has primary responsibility for administering the Alberta Health Care Insurance Plan. Part of the roles and responsibilities of the staff in Client Services are to respond to client inquiries, process registrations and health insurance enrolments, and administer health service payments. Client Services also provides the administrative support for the Appeal Panel. The Out of Province/Out of Country Claims Unit is housed in Client Services and is responsible for processing the claims that have been approved by the Committee or the Appeal Panel.

The decision letters of the Committee and the Appeal Panel to approve the funding for out of country health services are provided to the claims area of Client Services for processing.

II. FINDINGS AND OBSERVATIONS

COMMUNICATION/PUBLIC INFORMATION

The Department operates a client contact centre, also known as a call centre, which handles inquiries about a wide range of topics. This investigation found the call centre is appropriately referring inquiries about funding for out of country health services to the desk of the Administrative Assistant to the Committee.

The Department is responsible for the development of the website, and any forms or brochures or other publications. The development of these documents can either be a Department initiative or as the result of a request from either the Committee or the Appeal Panel.

Fairness and transparency dictate that people are entitled to clear, simple and up to date information about administrative tribunal processes. The Department is responsible for the provision of public information relating to the Committee and the Appeal Panel.

The investigation team had 59 telephone conversations with people who had called in response to the Alberta Ombudsman's invitation to contact his office. The investigation team determined there was limited awareness of the existence of the Committee and the Appeal Panel. The callers who

were not aware of the specialized services of the Committee and the Appeal Panel were appropriately referred by the investigation team.

Website

The Department maintains a home page on the Alberta government website. Information about the Committee is available on the Department's website however, there is no indication on the home page of that website of where or how to find the information. A person would have to know to click on the tab marked "Health Care Insurance Plan" and would then have another series of options before finally reaching the Committee information sheet. The Appeal Panel information sheet is also available on the website, but requires much more persistence to find. This lack of accessibility is administratively unfair.

Access to this information on the Department website needs to be given a higher profile than it currently has in order to ensure applicants or appellants have all the necessary information they need to submit a complete application or notice of appeal. With this information, applicants or appellants will be aware of the necessity for specialist or consult reporting and the need to address the issue of availability of the service in Alberta or Canada.

RECOMMENDATION

The Department should make the out of country health services portion of the website more accessible to the general public by placing a direct link to it on the Department's home page.

Department-Issued Pamphlets

The Department has one pamphlet for public distribution that references the Committee. The Alberta Health Care Insurance Plan pamphlet makes specific reference to the Committee and provides contact information. That pamphlet contains some information about the Committee and states "All insured elective health services require **prior** approval by the Committee to be eligible for payment." The pamphlet makes no reference to approval for non-elective health services or to the Appeal Panel.

The failure to explain the entire process for out of country health services, including reference to non-elective health services and the availability of an appeal, is administratively unfair.

RECOMMENDATION

The Department should amend the Alberta Health Care Insurance Plan pamphlet to provide information about approvals for non-elective health services and the availability of an appeal of a Committee decision.

Committee Information Sheet

The Committee information sheet provides information about the role of the Committee, its composition, who can apply, how to apply, what conditions must be met, the time frame for the Committee to make a decision, and what the Committee has the authority to approve.

There are some concerns with the content of the Committee information sheet:

- It makes no reference to elective or non-elective services, and only states that funding "must be approved **before** the services are provided." Nowhere in this publication is there any reference to situations where applications for non-elective health services can be considered by the Committee.
- While the Committee information sheet makes reference to the *Alberta Health Care Insurance Act*, there is inadequate reference to the *Regulation* which speaks directly to the functions and duties of the Committee.
- There is no reference to the Appeal Panel or the availability of an appeal process.
- There is no document production date on the Committee information sheet. Production date information would provide confirmation to the reader that the information in the document is current as of the date of production and has incorporated any relevant legislative changes.

RECOMMENDATION

The Department should amend the Committee information sheet to provide information about the limited situations where applications for non-elective health services can be considered, to reference the Out-of-Country Health Services Regulation, to reference the availability of an appeal process, and to provide the date of production of the Committee information sheet.

Appeal Panel Information Sheet

The Appeal Panel information sheet provides information about the role of the Appeal Panel, its composition, who can appeal, how to submit an appeal, time frames for appealing and for the Appeal Panel to make a decision, and what the Appeal Panel has the authority to approve. The Appeal Panel information sheet provides complete contact information and provides a document production date.

Physician's Resource Guide

The Physician's Resource Guide provides information about the Committee and refers to the availability of the Appeal Panel if the Committee denies funding. However, the Physician's Resource Guide refers a reader to the Committee for more information about the Appeal Panel. It is administratively unfair for the Committee to be identified as the Appeal Panel contact.

RECOMMENDATION

The Department should amend the Physician's Resource Guide to refer physicians to the Appeal Panel for further information about the Appeal Panel process.

The Administrator to the Appeal Panel performs a number of functions in the Department that are reflected in the position description. However, the position's duties and responsibilities in relation to the Appeal Panel are not in the position description. It is an administrative unfairness to the employee holding the Administrator position when the duties and responsibilities of that position are not documented in the position description.

This investigation found the Administrator received little to no training when assigned to the position of Administrator for the Appeal Panel. It is an administrative unfairness to not ensure an employee receives training to fulfill the functions of the position in which he or she has been placed.

RECOMMENDATION

The Department should update the position description of the Administrator to accurately reflect his or her job duties in relation to the Appeal Panel.

RECOMMENDATION

The Department should ensure that, in future, an employee assigned to the duties of the Administrator to the Appeal Panel receives full training.

RECOMMENDATION

When the recommendations in this report are implemented, the Department will need to inform all registered physicians and dentists of the changes that have been made.

CONCLUDING REMARKS OF THE ALBERTA OMBUDSMAN

This investigation has reaffirmed the need for a program such as the out of country health services program to compensate residents of Alberta who must travel outside of Canada when necessary to avail themselves of specialist medical services in a timely manner. I do not believe it is efficient or effective to attempt to provide all such specialized services within Alberta. This was recognized by the Minister of the day when the program was first announced in 1996 and continues to exist today. However, the program must be delivered in an administratively fair manner and this investigation has demonstrated there are obvious shortcomings in meeting that requirement.

This investigation was launched based on concerns arising from several sources. Residents of Alberta complained to me about the unfairness of the decisions rendered by the Committee and the Appeal Panel for several years. My investigations supported many of these complaints and found systemic unfairness resulting in repeated recommendations to the Appeal Panel and the Department for changes to their processes and rehearing of appeals. Additionally, the Court identified many of the same shortcomings in the McGregor decision which I referenced in this report. I made recommendations and representations to the former and current Appeal Panel Chairs and the former and current Ministers of Health and Wellness to address the unfairness identified. These efforts did not resolve all the issues. A common concern was that the decisions failed to provide sufficient rationale to allow the reader to understand how the decision was arrived at. Interestingly, the Court came to a similar conclusion in the McGregor decision.

The roles of the Committee and Appeal Panel and the accountability relationship to the Minister are now spelled out clearly in the Section 5 of the Public Agencies Governance Framework, February 2008 (the Framework). Section 5.1 provides the government's policy on roles and responsibilities of agencies such as the Committee and the Appeal Panel as follows:

> All agencies will have clearly articulated roles and responsibilities. This will occur through formalized documents that describe: the mandate of the agency, the roles of government and the agency, the accountability chain, a process for annual reaffirmation of mandate documents and how the renewal of mandate documents will occur.

Section 5.2 of the Framework clearly articulates the accountability relationship between such agencies and the Minister as follows:

> The minister is ultimately responsible to the public for how the work of the government is accomplished; the authority to conduct government business flows from the minister through to the agency, and some level of accountability must flow back. Once a responsibility is given to an agency, the agency must be able to exercise discretion within the bounds of its mandate while being held accountable for its results.

Adherence to the policies and accountability relationships set out in the Framework will improve the function and transparency of agencies such

as these in future. As we prepare this report, Bill 32, the *Alberta Public Agencies Governance Act*, is currently before the Legislative Assembly of Alberta. This Bill will provide a legislative basis for the principles contained in the Framework.

Implementation of the recommendations made in this report will go a long way toward addressing the identified shortcomings in the delivery of this program to Albertans. The recommendations are focused on fixing systemic problems identified in this investigation as well as providing redress to affected residents who have been unfairly treated in the past.

It is worth noting the examples of unfairness identified in this investigation are not unique to this program. The principles of administrative fairness apply to all programs and services provided by government departments and agencies. My investigations have identified similar unfairness in the decision making processes of many other authorities. All departments and agencies would be well advised to review their own processes in the context of the findings and recommendations in this report and make changes where warranted.

In conclusion, I would like to acknowledge the cooperation extended by the Committee Chair and members of the Committee, the Appeal Panel Chair and members of the Appeal Panel and the Minister and staff of the Department to my investigation team throughout this investigation. They have demonstrated their competence and commitment to delivering this program to Albertans to the best of their ability. I fully expect that spirit of cooperation and willingness to make the necessary changes to improve the administrative fairness of this program will facilitate implementation of all of my recommendations in this report. Albertans deserve no less.

G. B. (Gord) Button
Alberta Ombudsman

RECOMMENDATIONS RESPECTING THE OUT-OF-COUNTRY HEALTH SERVICES COMMITTEE

1. The appointment dates for the Committee members should be staggered to promote continuity so the ongoing functioning of the Committee is not compromised.

2. The Committee should ensure a physician from the Committee participates in the interview of a potential member when recruiting for a vacancy.

3. The *Out-of-Country Health Services Regulation* should be amended to require that all applications to the Committee for funding be submitted by physicians or dentists on behalf of a resident.

4. The *Out-of-Country Health Services Regulation* should be amended to require that all applications to the Committee for funding include a requirement for written reports from specialists.

5. The resident on whose behalf the application is being made should be copied on all correspondence from the Committee.

6. The Committee should work with the Department to create a stand-alone application form specific to the types of out of country funding requests the Committee is mandated to consider.

7. The stand-alone application form should be easily accessible on the Department website and should also be available in hard copy. The Committee information sheet and the *Out-of-Country Health Services Regulation* should also be easily accessible on the Department website.

8. The Committee Chair should provide a written caution in the acknowledgement letter of the possibility the resident may be liable for the costs of the health service if he or she obtains the service out of country prior to the Committee making a decision.

9. The letter from the Committee Chair requesting that further information be submitted before the application can be considered to be complete, should state it is the Committee Chair who is requiring the information in accordance with Section 7 of the *Out-of-Country Health Services Regulation*.

10. The Committee should develop a policy for responding in writing to all requests for in-person hearings and provide an adequate explanation of its practice.

11. As a preliminary step, the Committee should determine its authority to review an application taking into account the limitation periods for submitting an application established in Section 2(2) of the *Out-of-Country Health Services Regulation*, and if the applicable limitation period has not been met, the Committee should decide that it has no authority to review the application and should, therefore, not proceed to make a decision on the merits of the funding request.

12. The Committee should address all preliminary matters that have arisen which includes identifying conflicts of interest, in the decision letter.

13. The Committee should identify by name those members who participated in the decision regarding funding of out of country health services, in the decision letter.

14. The Committee should identify the relevant sections of the *Out-of-Country Health Services Regulation* that establishes the Committee's authority, and that it applied in making its decision, in every decision letter.

15. The same package of information that is distributed to all Committee members should be provided to the applicant, as well as notice of the date the Committee will be hearing the application. The applicant must be provided with an opportunity to respond to any evidence to be reviewed by the Committee.

16. The Committee should indicate how it assessed the evidence before it and state its findings of fact based on the evidence it reviewed, in the decision letter.

17. The Committee should explain the rationale for its decision by making a connection between the evidence presented and the conclusion it reached, in the decision letter.

18. Where the Committee concludes that the health services for which funding is being requested are available in Alberta or Canada based on evidence before it that a particular physician(s) or medical centre(s) in Alberta or Canada provides the health services, the Committee should provide the name(s) of the physician(s) and/or medical centre(s), as the case may be, in the decision letter. The decision letter should contain a proviso that the list provided shall not constitute a medical referral.

19. Where the Committee concludes that the health services for which funding is being requested are available in Alberta or Canada in a reasonable time period given the resident's condition, the Committee should outline the evidence it relied on in arriving at that conclusion, in the decision letter.

20. The Committee should include a notice of the right to appeal, as required by the *Out-of-Country Health Services Regulation*, in every decision letter.

21. The Committee should develop written policy on how to handle new evidence that is submitted after the written decision is issued.

22. The Committee Chair should make it mandatory for the members to receive training and ongoing education which enhances their roles as decision makers and decision writers as members of an administrative tribunal. The Committee Chair should receive training to enhance decision writing skills.

RECOMMENDATIONS RESPECTING THE OUT-OF-COUNTRY HEALTH SERVICES APPEAL PANEL

23. The Appeal Panel should ensure recruitment of members follows an open and transparent process by advertising for all vacancies.

24. The Appeal Panel Chair should ensure that when a physician is being recruited to the Appeal Panel, there should be a physician member on the interview panel to enhance the goal of competency-based recruiting. When a non-physician member is being recruited to the Appeal Panel, the Appeal Panel Chair should be on the interview panel.

25. The Appeal Panel should ensure its orientation program provides complete information on roles and responsibilities of the Appeal Panel and its members. Orientation should be conducted by individuals qualified to provide such orientation.

26. Only the Appeal Panel should decide whether any information and/or evidence submitted by an appellant to the Appeal Panel is considered to be new evidence. The decision of the Appeal Panel should be in writing to the appellant.

27. As a preliminary step, the Appeal Panel should determine its authority to hear the appeal taking into account the limitation periods established in Section 13(1) of the *Out-of-Country Health Services Regulation*. If the limitation period has not been met by the appellant, the Appeal Panel should decide that it has no authority to consider the appeal and should, therefore, not proceed to make a decision on the merits of the appeal.

28. The Appeal Panel should address all preliminary matters that have arisen which include conflicts of interest, in the decision letter.

29. The Appeal Panel should develop a policy for responding in writing to all requests for in-person hearings and provide an adequate explanation of its practice.

30. The Appeal Panel should identify by name the members who participated in the decision regarding funding of out of country health services, in every decision letter.

31. The Appeal Panel should cite the current 2006 *Out-of-Country Health Services Regulation* which establishes the Appeal Panel's authority, in every decision letter.

32. The Appeal Panel should clearly identify that it considered all the file material that was in front of the Committee, the decision letter of the Committee, as well as the letter of appeal, in the decision letter.

33. The Appeal Panel should indicate how it assessed the evidence before it and state its findings of fact based on the evidence it reviewed, in the decision letter.

34. The Appeal Panel should be consistent in explaining the rationale for its decision by making a connection between the evidence presented and the conclusion reached, in every decision letter.

35. The Appeal Panel should address the major arguments of the appellant, in the decision letter.

36. The Appeal Panel should comply with the requirement in Section 13(6) of the *Out-of-Country Health Services Regulation* by sending a copy of the decision letter to the Minister.

37. The Appeal Panel Chair should make it mandatory for the members to receive training and ongoing education to enhance their roles as decision makers and decision writers as members of an administrative tribunal. The Appeal Panel Chair should receive training to enhance decision writing skills.

38. The decision letters of the Appeal Panel and all Appeal Panel correspondence should be written on Appeal Panel letterhead.

39. The voice mail message on the Administrator's telephone should reference not only the Administrator's title with the Department, but also the title as Administrator to the Appeal Panel.

40. All documentation received by the Appeal Panel should be date stamped.

41. The monitoring of the mandated 60 day deadline to hear an appeal should be formalized.

42. A letter of acknowledgement should be sent out to every appellant confirming receipt of the appeal and explaining the Appeal Panel process, which includes information about the requirement for a decision to be made within 60 days of receipt of a notice of appeal.

43. Any contacts the Administrator has in relation to the appeal should be documented on the appellant's file.

44. A copy of the Appeal Panel decision should be filed on the appellant's file when the decision is issued to the appellant.

45. The Appeal Panel binder containing orientation and procedural material should be reviewed and updated on a regular basis.

46. The Appeal Panel should conduct re-hearings in the four files as recommended by the Ombudsman.

RECOMMENDATIONS RESPECTING THE DEPARTMENT OF HEALTH AND WELLNESS

47. The Department should make the out of country health services portion of the website more accessible to the general public by placing a direct link to it on the Department's home page.

48. The Department should amend the Alberta Health Care Insurance Plan pamphlet to provide information about approvals for non-elective health services and the availability of an appeal of a Committee decision.

49. The Department should amend the Committee information sheet to provide information about the limited situations where applications for non-elective health services can be considered, to reference the *Out-of-Country Health Services Regulation*, to reference the availability of an appeal process, and to provide the date of production of the Committee information sheet.

50. The Department should amend the Physician's Resource Guide to refer physicians to the Appeal Panel for further information about the Appeal Panel process.

51. The Department should update the position description of the Administrator to accurately reflect his or her job duties in relation to the Appeal Panel.

52. The Department should ensure that, in future, an employee assigned to the duties of the Administrator to the Appeal Panel receives full training.

53. When the recommendations in this report are implemented, the Department will need to inform all registered physicians and dentists of the changes that have been made.

LIST OF APPENDICES

APPENDIX A - December 2, 2008 letter from the Alberta Ombudsman to the Minister of Health and Wellness

APPENDIX B - *McGregor v. Alberta (Out-of-Country Health Services Appeal Panel)*, 2007 ABQB 138

APPENDIX C - *Alberta Health Care Insurance Regulation*, AR 216/81

APPENDIX D - *Out-of-Country Health Services Regulation*, AR 78/2006

APPENDIX E - Committee Information Sheet

APPENDIX F - Appeal Panel Information Sheet

ALBERTA OMBUDSMAN
Focused on Fairness

December 2, 2008 Our File #08-81906

THE HONOURABLE RON LIEPERT
MINISTER
ALBERTA HEALTH AND WELLNESS
323 LEGISLATURE BUILDING
EDMONTON AB T5K 2B6

Re: Alberta Ombudsman Own Motion Investigation – Out-of-Country Health Services program

Dear Minister Liepert:

In response to a number of concerns noted during recent investigations by my office, I have decided to conduct an investigation, under my own motion, pursuant to Section 12(2) of the *Ombudsman Act*. My investigation will focus on the whether Alberta Health and Wellness is meeting the needs of Albertans in accessing out-of-country health services that are either not available in Alberta or are not available in a timely manner. I will publicly announce my investigation today at 11:00 am.

The purpose of the investigation is to review the administrative fairness of:

i) how Albertans are informed of the availability of funding for out-of-country health services,

ii) how medical practitioners are informed about the requirements and availability of funding for out-of-country health services,

iii) how out-of-country claims are reviewed,

iv) the decision making process of the Out-of-Country Health Services Committee (the Committee) and the Out-of-Country Health Services Appeal Panel (the Appeal Panel),

v) how wait times factor into the decision making process,

vi) how decisions are conveyed to Albertans.

I have assigned a team of investigators: Diann Bowes, Joanne Roper, and Kevin Greco, to gather the required information. The team will be in contact with the office of the Deputy Minister of Alberta Health and Wellness, and the offices of the Chairs of the Committee and the Appeal Panel, in order to commence the investigation.

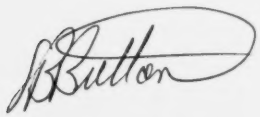
When my investigation is completed, I will issue a public report of my findings and recommendations pursuant to Section 28(2) of the *Ombudsman Act*. Prior to taking that step, I will advise you of my findings and recommendations in accordance with the provisions of Section 28(3) of the *Ombudsman Act*. This will provide you the opportunity to make representations before I publish my report.

I am also providing the same letter you are receiving to Linda Miller, Acting Deputy Minister of Alberta Health and Wellness; Dr. Raymond Howard, Chair of the Committee; and Dr. David Shragge, Chair of the Appeal Panel.

Thank you for your assistance in this matter.

Any materials, such as memoranda and correspondence, relating to a complaint submitted to the Ombudsman and any material produced by the Ombudsman, such as this letter, cannot be used in any other proceedings, including before a board or a court. This applies whether you or the Ombudsman have possession of any of these materials.

Sincerely,



G. B. (Gord) Button
Alberta Ombudsman

/mjh

Court of Queen's Bench of Alberta

Citation: McGregor v. Alberta (Out-Of-Country Health Services Appeal Panel), 2007 ABQB 138

Date: 20070305
Docket: 0603 12562
Registry: Edmonton

Between:

Terry Michael McGregor

Applicant

- and -

The Out-Of-Country Health Services Appeal Panel

Respondent

Reasons for Judgment
of the
Honourable Mr. Justice D.A. Sirrs

Introduction

[1] Mr. McGregor was refused funding for back surgery performed by the Mayo Clinic in Scottsdale, Arizona by both The Out-Of-Country Health Services Committee (OOCHSC) and The Out-Of-Country Health Services Appeal Panel (OOCHSAP). He seeks judicial review of both decisions by this Court.

Facts

[2] On November 22, 2003, Mr. McGregor broke his back.

[3] On November 25, 2003, Dr. Woo operated on Mr. McGregor's back, including placing of spinal hardware in his back.

[4] On December 8, 2004, Dr. Woo having moved to Saskatoon, Dr. Michel Lavoie removed the hardware in Mr. McGregor's back. From x-ray results, Dr. Lavoie concluded that the back fracture had healed.

[5] As Mr. McGregor continued to have significant back pain, his family physician recommended an MRI. The MRI disclosed "an absence of bony bridging across the longer fracture fragments." It was also concluded that as Mr. McGregor suffered from osteoporosis, his back had not healed properly.

[6] Beginning July 2005, Mr. McGregor started asking Dr. Clark about going to the Mayo Clinic. Dr. Clark convinced him to keep trying to find medical treatment in Alberta. Dr. Clark referred Mr. McGregor to a neurosurgeon, Dr. Max Findlay, but Dr. Findlay rejected Dr. Clark's request for an assessment, saying ". . . given the magnitude of his complaints, this type of surgery is beyond my expertise and I don't think I'd be very useful to him."

[7] Mr. McGregor was by this time despondent over his medical treatment in Alberta and decided to seek treatment at the Mayo Clinic in Scottsdale, Arizona.

[8] No application was made to the OOCHSC at this time to pre-approve funding his visit to or treatment at the Mayo Clinic.

[9] On October 13, 2005, Mr. McGregor visited with Dr. Birch at the Mayo Clinic at which time Dr. Birch:

1. Determined that the L1 compression/burst fracture had not healed.
2. There was no urgent need for surgery; it was a quality of life issue for Mr. McGregor.
3. If Mr. McGregor were to consider surgery, he believed the appropriate procedure would be an "interior retrodiaphragmatic, retroperitoneal, retropleural exposure of the thoracolumbar junction with a partial L1 corpectomy to remove the fractured vertebrae and fibular strut grafting with autogous rib and bone morphogenic protein coupled with lateral screw rod fixation from T12 through L2."

[10] It should be noted that in a letter dated October 17, 2005 from Greg Elbert with Barry D. Birch of the Mayo Clinic to Manulife Affinity Markets, the procedure is described as ". . . surgical decompression with fusion . . ." and ". . . an anterior lateral approach to decompression and fusion using the patient's own auto graft and bone morphogenic protein."

[11] Also, in a letter dated October 13, 2006 to Mr. McGregor, Dr. Birch referred to the surgery as "the anterior approach versus posterior surgery."

[12] On October 25, 2005, Dr. Birch performed the surgery.

[13] Although Mr. McGregor alleges that he noticed a dramatic improvement in all facets of his health, by September 30, 2006, he retired from the practice of law on the advice of his doctors.

[14] On November 16, 2005, Mr. McGregor made application to be repaid the $137,215.73 in expenses he incurred while being treated at the Mayo Clinic.

[15] The OOCHSC advised Mr. McGregor that in order to evaluate the application, Mr. McGregor should provide the OOCHSC with a number of things, including "Documentation confirming that Canadian resources were fully utilized and/or documentation showing the service was unavailable in Canada."

[16] To comply with this requirement, Mr. McGregor had Dr. Clark write a letter. By letter dated January 6, 2006, Dr. Clark advised the OOCHSC:

1. Starting in July 2005, Mr. McGregor was discussing going to the Mayo Clinic to seek treatment for his back pain, but Dr. Clark convinced him to try everything he could in Alberta first.

2. That Mr. McGregor in August 2005 had an MRI that revealed "The absence of apparent solid bony bridging along some of the large fragments."
3. In September 2005, Mr. McGregor was referred to Dr. Breay Patey who diagnosed secondary osteoporosis.
4. That he tried to get a neurosurgeon, Dr. Findlay, to assess Mr. McGregor without success.
5. At this point, Mr. McGregor became despondent and sought out-of-country assistance.

[17] Dr. Clark does not render an opinion about the lack of other Canadian resources or whether other Canadian surgeons could have performed the surgery done by Dr. Birch.

[18] On February 1, 2006, OOCHSC notified Mr. McGregor that his application for funding for "consultation, anterior lateral approach to decompression and fusion surgery and follow-up consultation" was denied. The OOCHSC concluded that not only was the procedure available in Canada, but available in Alberta. The OOCHSC then referenced a list of twelve doctors who they said could perform the procedure.

[19] On March 22, 2006, Mr. McGregor appealed the OOCHSC decision to the Appeal Panel of OOCHSAP.

[20] Mr. McGregor's grounds of appeal were:

1. That the OOCHSC committed an error in law by considering the list of doctors without providing Mr. McGregor an opportunity to respond to the list.
2. That the onus to "scour the country" for treatment was too onerous. Mr. McGregor had done all a reasonable person should be asked to do.
3. That many of the doctors on the list had been consulted by Mr. McGregor and had not suggested Dr. Birch's surgery option.
4. That the OOCHSC erred in calling the procedure an "anterior lateral approach to decompression and fusion surgery."
5. The OOCHSC erred in not placing any or the appropriate weight on Dr. Findlay's letter regarding the availability of treatment in Canada.
6. Entitlement to be reimbursed for the cost in Canada of the Mayo Clinic's procedure.

[21] By a letter dated April 12, 2006, the Appeal Panel dismissed Mr. McGregor's appeal saying only they agreed to uphold the OOCHSC's decision to deny funding based on the premise that Canadian resources were not fully utilized.

Analysis

Decision of the OOCHSC

[22] The applicant submits that the use by the OOCHSC of the list of doctors without the applicant having an opportunity to respond to the list, breaches the OOCHSC's legal responsibility of providing natural justice and procedural fairness.

[23] The parties agree that this is a question of law and the standard of review is correctness.

[24] Mr. McGregor was applying for funding after having his surgery at the Mayo Clinic.

[25] The letter of November 29, 2005 from the OOCHSC, in my view, clearly told Mr. McGregor that he bore the responsibility to convince the OOCHSC that the Mayo Clinic service was not available in Canada.

[26] Mr. McGregor does not seem to have considered that the procedure recommended by Dr. Birch on October 13, 2005 would be available in Alberta. After all, this was the Mayo Clinic. The terminology used to describe the surgical procedure by Dr. Birch in itself suggests a complicated surgical procedure that only the Mayo Clinic could perform. The fact that the Mayo Clinic could do the surgery on October 25, 2005, less than 2 weeks later, probably added to Mr. McGregor's lack of consideration that maybe he should talk to Dr. Clark about whether anyone in Alberta could do the surgery and, of course, whether a Canadian doctor would recommend the procedure in Mr. McGregor's case.

[27] The fact that Mr. McGregor did not seek an opinion from Dr. Birch either before the surgery or when making the application to the OOCHSC, as to the uniqueness of the procedure, again suggests that Mr. McGregor was quite confident that no doctor in Alberta could do the surgery. From the decision of the OOCHSC, I can only conclude that Mr. McGregor was wrong. The OOCHSC appears to have been of the view that there were at least 12 doctors who could have duplicated the surgery done at the Mayo Clinic. After the fact, Mr. McGregor wants to now be able to submit additional information to the OOCHSC concerning whether the doctors on the list could have done the surgery, under the guise that it was procedurally unfair not to tell him that he had a bigger problem than he thought in meeting the onus that the Mayo Clinic procedure was unique.

[28] Mr. McGregor's failure to comprehend the scope of what was required of him does not, in my view, equate to procedural unfairness. For the OOCHSC to have at its disposal the "doctor's list" without Mr. McGregor's knowledge, does not, in my view, constitute procedural unfairness.

[29] The fact that the OOCHSC then saw fit to provide the list to Mr. McGregor to support the OOCHSC's finding, is indicative, in my view, of procedural fairness because, if they are in error, it provides some support for Mr. McGregor's appeal to the OOCHSAP i.e., that the OOCHSC erred in both its assessment of the uniqueness and the expertise required to do the surgery.

Analysis of the Decision of the Appeal Panel

[30] The Appeal Panel's reason for dismissing Mr. McGregor's appeal is quite succinct. They agreed with the OOCHSC's finding that Canadian resources had not been fully utilized. The respondent has provided legal authority to support that: 1. reasons may be obscure; 2. reasons of lay persons should not be subject to "painstaking scrutiny"; 3. the level of detail in reasons varies in light of the circumstances of each case; 4. the level of detail will be sufficient if they show why or how or on what evidence the delegate reached its conclusion.

[31] The respondent says the reasons should be considered in the context of the decision made.

[32] The applicant relies upon a decision from our Court of Appeal. In ***Couillard v. Edmonton (City)*** [1979] 18 A.R. 31 (Alta. C.A.), the court addressed the issue of adequate reasons for administrative tribunal decisions. The court indicated that in general:

> The reasons for a decision can be well-nigh meaningless without a statement of the facts to which they relate. For an example, a decision cannot be reviewed satisfactorily if it is not known whether it was influenced by irrelevant facts, or failed to take into account relevant facts, nor, where evidence is controverted or susceptible of interpretation, what was found to be fact, or the reason for the interpretation put on the evidence. The supervisory jurisdiction of the court is in the interests of due administration of justice and fair play for the parties affected, and there can be no doubt that the intention of the legislature is to enable the court to discharge properly this function so necessary in the general interest.
>
> It is not enough to assert, or more accurately, to recite, the fact that evidence and arguments led by parties have been considered.

[33] The OOCHSAP described its function in their letter of April 4, 2006 (Respondent's Return - Tab 3A) as ensuring that the OOCHSC followed the legislative guidelines and that the application was dealt with in a fair and equitable manner.

[34] In my view, all six grounds of appeal of the applicant warranted a response from the Appeal Panel together with the reasoning behind their acceptance or rejection of the grounds of appeal. At the very least, the Appeal Panel should have provided its reasoning behind a determination that Dr. Birch's procedure was not unique and why any number of orthopaedic or neurological surgeons could have done the surgery.

[35] The decision of the OOCHSC was to deny the appeal. The reason given was that Canadian resources had not been fully utilized.

[36] No attempt was made to recite any facts upon which the Appeal Panel relied.

[37] I am left with the view that the Appeal Panel is suggesting that the appeal had no merit whatsoever and thus could be summarily dismissed.

[38] The requirement to give reasons is mandated by s. 28.07(5) of the regulations, and thus being a legal requirement, the test upon review is correctness.

[39] In my view, the reasons of the Appeal Panel are obscure and at best could be said to adopt the reasons of the OOCHSC. These reasons fail to address the grounds of appeal.

[40] I find the reasons to be so sorely lacking in substance that they fail to provide Mr. McGregor any understanding why his request for funding was denied.

[41] If it could be said that the OOCHSAP met the legal requirement to provide a reason for its conclusion, I have no finding of facts to be able to determine whether or not their decision was reasonable.

Standard of Review

[42] The standard of review for an error in law is correctness. Whether the use of the list of doctors by the OOCHSC was procedurally unfair is a question of law.

[43] The requirement for the OOCHSAP to provide reasons for its decision is also a question of law.

[44] Decisions of the OOCHSC and OOCHSAP that are not a question of law, should be reviewed on a standard of whether they are reasonable.

Conclusion

1. Jurisdiction

[45] Both parties have agreed that this Court has jurisdiction to conduct a judicial review of the decisions of both the OOCHSC and the Appeal Panel.

2. The Use of the List of Doctors by the OOCHSC

[46] I find that the OOCHSC was correct in its use and referral to a list of physicians in determining whether Canadian physicians were available to conduct the surgery for which payment is requested.

[47] Although Mr. McGregor, as a citizen, may not fully comprehend the complexity of a surgery and whether a Canadian specialist were available, as the applicant for funding, he bears the onus of convincing the OOCHSC of the uniqueness of the procedure, and why no Canadian physician could perform the surgery. As previously indicated, Mr. McGregor either was of the opinion that his operation was so complex that it was obvious no one in Canada could perform the surgery, or because the doctors in Canada had not discussed the "anterior approach" surgery with him, obviously they did not know how to do it.

[48] Also, notwithstanding Ms. Paisley's letter of April 4, 2006 (Tab 3A in the Return) in which she states that the Appeal Panel cannot review new information, I agree with the respondent's brief, in which they state that the Appeal Panel has a discretion to receive new information.

[49] In a case such as this, where Mr. McGregor disagrees with the OOCHSC's conclusion concerning the competence of Canadian physicians to perform a certain surgery, the Appeal Panel should use its discretion to permit the appellant to provide better particulars as to the complexity of the

procedure and as to why no Canadian doctors have the necessary skill to do the procedure.

[50] Mr. McGregor would thus have a remedy and in my view, the list would assist him on appeal and thus does not support his position on procedural unfairness at the OOCHSC level.

3. The Reasons of the Appeal Panel

[51] I am unable to determine what was considered by the Appeal Panel. Whether they reconsidered the complexity of the surgery performed by Dr. Birch or the likelihood of the competence of the list of Canadian physicians to perform the surgery, I am unable to determine.

[52] In my view, the Appeal Panel should have permitted Mr. McGregor to approach his doctors, including Dr. Woo, Dr. Lavoie, Dr. Findlay, Dr. Clark, and Dr. Birch, to provide an opinion on their and other Canadian doctors' competence to perform the "anterior approach" surgery done by Dr. Birch. Instead, Ms. Paisley, by her letter of April 4, 2006, tells Mr. McGregor that the Appeal Panel cannot consider new information.

[53] From the reason given by the Appeal Panel, I cannot determine if any of Mr. McGregor's grounds of appeal were considered. From the cursory reason given, I conclude that the Appeal Panel was of the view that most orthopaedic surgeons and neurological surgeons could perform the surgery; that is, that the surgery was routine for these specialists. If such was the case, why not simply state this fact in their reasons. Instead, one is left to guess what the Appeal Panel considered relevant to reach their conclusion.

[54] As the reasons were not provided, and by Regulation 28.07(5), the Appeal Panel is by law obliged to provide their reasons, I find that the decision of the Appeal Panel was not correct.

[55] If one accepts that the OOCHSAP met its legal requirement by providing the obscure reason that Mr. McGregor had not shown that Canadian resources were fully utilized, then I must conclude that the total lack of a factual basis for this reason, makes it impossible for me to weigh the decision to determine whether it was reasonable in the circumstances. Thus, I would conclude that the decision of the OOCHSAP was not reasonable.

4. Remedy

[56] I agree with counsel that the return of this matter to the OOCHSAP to provide their reasons, or a factual basis for their reasons, would not be proper.

[57] Mr. McGregor did not submit any new information surrounding the uniqueness of the operation and/or opinions concerning Canadian doctors' competence to perform the surgery. Thus, to just send the matter back for reasons, the OOCHSAP would not have an opportunity to consider the admission of new information. In my view, the only reasonable remedy is for Mr. McGregor to gather the new information and start over.

[58] Thus, I quash both the decisions of both OOCHSAP and OOCHSC, and I direct that Mr. McGregor be entitled to submit a new application to the OOCHSC within 90 days and that should the application be made by Mr. McGregor, the OOCHSC shall hold a hearing de novo of Mr. McGregor's application.

[59] The applicant may prepare the Order and submit it for my signature.

Heard on the 13th day of February, 2007.

Dated at the City of Red Deer, Alberta this 1st day of March, 2007.

D.A. Sirrs
J.C.Q.B.A.

Appearances:

Christopher G. Hoose
for the Applicant

Blair E. Maxston
for the Respondent

ALBERTA HEALTH CARE INSURANCE AR 216/81

Division 1 Repealed AR 7/2003 s2.

Division 2

Out-of-Country Health Services Program

26.1(1) Subject to subsection (2), a resident may apply in writing to OOCHSC for approval of the payment of expenses to be incurred, or that have been incurred, with respect to insured services or insured hospital services received outside of Canada, where the resident or his dependant has endeavoured to receive the services in Canada and they are not available in Canada.

(2) Repealed AR 52/96 s5.

(3) No application under subsection (1) shall be made with respect to services received prior to January 1, 1988

AR 139/88 s6; 147/95; 52/96

Division 3 Repealed AR 7/2003 s.2.

Division 4

Out-of-Country Health Services Committee

28.01(1) The Out-of-Country Health Services Committee is hereby established.

(2) The OOCHSC shall consist of the following members:

(a) 4 physicians, to be appointed by the Minister;

(b) the person who is the Out-of-Province Claims Team Leader in the Department of Health and Wellness.

(3) The term of the members referred to in subsection (2)(a) shall be not more than 3 years, and those members are eligible for reappointment.

(4) The person referred to in subsection (2)(b) shall be the Chair of the OOCHSC.

(4.1) The Minister may designate an employee of the Government under the administration of the Minister as an alternate for the member referred to in subsection (2)(b) to act in the place of that member when that member is temporarily absent or unable to act.

(5) The quorum for the purpose of meetings of the OOCHSC is 3 members, one of whom must be the Chair or the Chair's alternate.

(6) Remuneration and expenses payable to the members of the OOCHSC who are not employees of the Government is twice the rate set out in Schedule 1, Part A of the Committee Remuneration Order, O.C. 769/93.

AR 52/96 s8; 19/98; 206/2001

28.02(1) On and after the coming into force of this section OOCHSC shall review, evaluate and decide on all applications made under section 26.1, including those commenced but not withdrawn or disposed of before the coming into force of this section.

(2) The Chair and the Chair's alternate are non-voting members of the OOCHSC.

(2.1) A tie vote on a matter shall be considered to be a vote against the matter.

(3) A decision of the majority of the members of the OOCHSC is deemed to be a decision of the OOCHSC.

(4) OOCHSC shall, on the request of the Minister,

(a) submit reports to the Minister on its activities;

(b) carry out any other activities related to insured services and insured hospital services that the Minister considers appropriate.

AR 52/96 s8; 19/98

28.03(1) Notwithstanding section 26.1, an application under section 26.1 may be made on behalf of a resident to OOCHSC

(a) by the resident's person representative, or

(b) by a physician registered under the *Medical Profession Act*.

(2) An application must include information, including medical information, that, in the opinion of the OOCHSC, is sufficient for the OOCHSC to evaluate the application.

(3) OOCHS shall review each application that meets the requirements of subsections (1) and (2) and decide, within 60 days of receiving the application,

(a) whether the services are insured services or insured hospital services,

(b) whether payment with respect to insured services and insured hospital services received or to be received outside of Canada is to be approved, and

(c) the amount of payment with respect to the insured services or insured hospital services that may be made.

(4) In making a decision under subsection (3), OOCHSC may not approve payment for

(a) subsistence and accommodation costs of the person receiving insured services or insured hospital services outside of Canada nor of anyone who accompanies that person,

(b) insured services or insured hospital services provided outside Canada if the services are available in Canada, and

(c) services that, in the opinion of the OOCHSC, are experimental or applied research.

(5) OOCHSC shall within 5 days, excluding Saturdays, Sundays and holidays, send

(a) a written copy of its decision with reasons to each of the Minister and the applicant and, if the applicant is the physician or personal representative, to the person with respect to whom the application is made, and

(b) advice to the applicant and, if the applicant is the physician or a personal representative, to the person with respect to whom the application is made on the right to appeal the decision.

AR 52/96 s8

28.04 An applicant may appeal a decision of the OOCHSC under section 28.03 to the Appeal Panel by submitting a notice of appeal to the Appeal Panel within 60 days of receipt of the decision.

AR52/96 s8

28.05(1) The Out-of-Country Health Services Appeal Panel is hereby established.

(2) The Appeal Panel consists of 6 members appointed by the Minister, of which 4 must be physicians, one must be an ethicist and one must be a member of the general public.

(3) The term of a member is the term specified by the Minister in the appointment.

(4) The Minister may designate a member of the Appeal Panel as the Chair and a member of the Appeal Panel as the Vice-chair.

(5) A quorum of the Appeal Panel consists of 3 members, 2 of whom must be physicians, and one of whom must be either the ethicist or the member of the general public.

(6) Payment of remuneration and expenses to the members of the Appeal Panel who are not employees of the Government is,

(a) in the case of a member who is a physician, 2 times the rate set out in Schedule 1, Part A of the Committee Remuneration Order, O.C. 769/93, and

(b) in the case of a member who is not a physician, 1.5 times the rate set out in Schedule 1, Part A of the Committee Remuneration Order, O.C. 769/93.

AR 52/96 s8; 7/2003

28.06(1) The Chair and the Vice-chair are voting members of the Appeal Panel.

(2) A decision of the majority of the members of the Appeal Panel who hear the appeal is deemed to be a decision of the Appeal Panel.

(3) A tie vote on a matter shall be considered to be a vote against the matter.

AR 52/96 s8; 7/2003

28.07(1) The Appeal Panel shall review the applicant's application and the OOCHSC's decision if a notice of appeal is received within 60 days of the appellant receiving the decision under section 28.03.

(2) In reviewing the OOCHSC's decision the Appeal Panel shall review the written decision and reasons and the matters referred to in section 28.03(3) and (4).

(3) An appeal must be heard and a decision made within 30 days of receipt of a notice of appeal.

(4) The Appeal Panel may confirm or vary the decision of the OOCHSC or substitute its decision for the OOCHSC decision.

(5) The Appeal Panel shall within 5 days, excluding Saturdays, Sundays and holidays, send a written copy of its decision with reasons to each of the members of the OOCHSC and the appellant and, if the appellant is the physician or personal representative, to the person with respect to whom the appeal is made.

AR 52/96 s8

(Consolidated up to 69/2009)

ALBERTA REGULATION 78/2006

Alberta Health Care Insurance Act

OUT-OF-COUNTRY HEALTH SERVICES REGULATION

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Interpretation

1(1) In this Regulation,

(a) "Appeal Panel" means the Out-of-Country Health Services Appeal Panel continued under section 11;

(b) "Chair", except in sections 11 and 12, means the chair of the Out-of-Country Health Services Committee;

(c) "dependant" means dependant as defined in the *Alberta Health Care Insurance Regulation*;

(d) "elective services" means insured services and insured hospital services that are not provided in an emergency or in other circumstances in which medical care is required without delay;

(e) "insured hospital services" means insured services as defined in Part 3 of the *Hospitals Act*;

(f) "OOCHSC" means the Out-of-Country Health Services Committee continued under section 3.

(2) For the purposes of this Regulation, a service is available in Canada if a resident could have obtained the service in Canada within the time period generally accepted as reasonable by the medical or dental profession for any resident with a similar condition.

Application

2(1) Subject to subsection (2), a resident of Alberta may apply to the OOCHSC for approval of the payment of expenses with respect to insured services or insured hospital services received outside of Canada, where the resident or the resident's dependant has endeavoured to receive the services in Canada and the services are not available in Canada.

(2) An application may only be made under subsection (1) with respect to

(a) elective services, if the application is made prior to receiving the services, or

(b) insured services or insured hospital services that are not elective services, if the application is made

(i) prior to receiving the services, or

(ii) not later than 365 days after the services were received.

(3) An application under subsection (1) must

(a) be in writing in a form established by the OOCHSC,

(b) contain the information required under section 7(1)(c), and

(c) include a letter in support of the application from

(i) an Alberta physician, if the services are insured medical services referred to in the *Medical Benefits Regulation* or insured hospital services, or

(ii) an Alberta dentist, if the insured services are oral and maxillofacial surgery services referred to in the *Oral and Maxillofacial Surgery Benefits Regulation*.

(4) An application under subsection (1) may be made on behalf of a resident to the OOCHSC

(a) by a resident's personal representative who is a resident of Alberta,

(b) by a physician registered under the *Medical Profession Act*, or

(c) by a dentist registered as a regulated member under Schedule 7 to the *Health Professions Act*.

OOCHSC continued

3 The Out-of-Country Health Services Committee established under the *Alberta Health Care Insurance Regulation* (AR 216/81) is continued.

Members

4(1) The OOCHSC consists of the following members appointed by the Minister:

(a) 4 physicians;

(b) an employee of the Department of Health and Wellness.

(2) The term of a member appointed under subsection (1)(a) shall not exceed 3 years, and the member is eligible for reappointment.

(3) The person referred to in subsection (1)(b) is the Chair.

(4) The Minister may designate an employee of the Department of Health and Wellness as an alternate for the member referred to in subsection (1)(b) to act as Chair in the place of that member when that member is temporarily absent or unable to act.

(5) Members of the OOCHSC who are not employees of the Department of Health and Wellness are entitled to

(a) $525 for up to and including four hours in any day and $131 for each additional hour or part of an hour in the day spent on the business of the OOCHSC, and

(b) travelling and living expenses in accordance with Schedule 1, Part A of the *Committee Remuneration Order*.

AR 78/2006 s4;240/2008

Quorum and voting

5(1) The quorum for the purpose of meetings of the OOCHSC is 3 members, one of whom must be the Chair.

(2) The Chair is a non-voting member of the OOCHSC.

(3) A tie vote on a matter is deemed to be a vote against the matter.

(4) A decision made by the majority of the members of the OOCHSC who are present at a meeting is, if the members present constitute a quorum, deemed to be a decision of the OOCHSC.

Functions of OOCHSC

6(1) The OOCHSC shall review, evaluate and decide on all applications made under section 2 that are declared to be complete by the Chair under section 7.

(2) The OOCHSC shall, on the request of the Minister,

(a) submit reports to the Minister on its activities, and

(b) carry out any other activities related to insured services and insured hospital services that the Minister considers appropriate.

Screening of application

7(1) When an application under section 2 is received by the OOCHSC, the Chair shall conduct an initial screening of the application to ensure that the application

(a) is submitted by a person referred to in section 2,

(b) is supported in writing by an Alberta physician or dentist unless there are extenuating circumstances as determined by the Chair, and

(c) contains information, including health information, that the Chair considers to be sufficient for the proper review by the OOCHSC.

(2) In carrying out the initial screening of an application under subsection (1), the Chair, or the person designated by the Chair for that purpose, may conduct any independent investigation that may be considered necessary in order to complete the initial screening of an application.

(3) After the Chair has concluded the initial screening of an application and is satisfied that the application meets the requirements set out in subsection (1), the Chair may declare the application complete and forward that application to the OOCHSC for review.

Review and decision of OOCHSC

8(1) Within 60 days from the date that the Chair has declared under section 7 that an application is complete, the OOCHSC shall decide

(a) whether the services referred to in the application are insured services or insured hospital services,

(b) whether to approve payment with respect to insured services and insured hospital services received or to be received outside of Canada, and

(c) whether, in respect of insured services and insured hospital services received or to be received outside of Canada, to impose conditions on payment.

(2) In making a decision under subsection (1), the OOCHSC may not approve payment for

(a) subsistence and accommodation costs of the person receiving insured services or insured hospital services outside of Canada or of anyone who accompanies that person,

(b) insured services or insured hospital services provided outside Canada if the services are available in Canada, and

(c) services that the OOCHSC decides are experimental or applied research.

(3) The OOCHSC may, if it considers it to be advisable or necessary, consult with health specialists in respect of the matter under its consideration before it renders its decision under subsection (1).

(4) Where the OOCHSC consults with a health specialist under subsection (3), the Minister may pay that health specialist an appropriate fee in respect of that consultation.

(5) The OOCHSC shall, within 10 days of making a decision under subsection (1), excluding Saturdays, Sundays and holidays, send

(a) a written copy of its decision with reasons to the Minister, to the applicant and, if the applicant is a person referred to in section 2(4), to the resident on whose behalf the application is made, and

(b) notice of the right to appeal the decision to the applicant and, if the applicant is a person referred to in section 2(4), to the resident on whose behalf the application is made.

Payment by Minister

9 If the OOCHSC approves an application for payment under section 8, the Minister shall pay for those services approved by the OOCHSC.

Appeal of OOCHSC decision

10 The resident or the person making the application on the resident's behalf under section 2 may appeal a decision of the OOCHSC under section 8 to the Appeal Panel by submitting a notice of appeal to the Appeal Panel within 60 days of receipt of the decision.

Appeal Panel

11(1) The Out-of-Country Health Services Appeal Panel established under the *Alberta Health Care Insurance Regulation* (AR 216/81) is continued.

(2) The Appeal Panel consists of 6 members appointed by the Minister, of which 4 must be physicians, one must be an ethicist and one must be a member of the general public.

(3) The term of the members referred to in subsection (2) shall not be more than 3 years, and those members are eligible for reappointment.

(4) The Minister may designate a member of the Appeal Panel as the chair and a member of the Appeal Panel as the vice-chair.

(5) A quorum of the Appeal Panel consists of 3 members, 2 of whom must be physicians, and one of whom must be either the ethicist or the member of the general public.

(6) Members of the Appeal Panel who are not employees of the Government are entitled to,

(a) in the case of the chair who is a physician,

(i) $790 for up to and including four hours in any day and $197 for each additional hour or part of an hour in the day spent on the business of the Appeal Panel, and

(ii) travelling and living expenses in accordance with Schedule 1, Part A of the *Committee Remuneration Order*,

(a.1) in the case of a member who is a physician,

(i) $525 for up to and including four hours in any day and $131 for each additional hour or part of an hour in the day spent on the business of the Appeal Panel, and

(ii) travelling and living expenses in accordance with Schedule 1, Part A of the *Committee Remuneration Order*,

and

(b) in the case of a member who is not a physician,

(i) remuneration in accordance with the *Committee Remuneration Order* at 1.5 times the rate set out in Schedule 1, Part A of that Order, and

(ii) travelling and living expenses in accordance with Schedule 1, Part A of the *Committee Remuneration Order*.

AR 78/2006 s11;240/2008;69/2009

Majority decision

12(1) The chair and the vice-chair of the Appeal Panel are voting members of the Appeal Panel.

(2) A decision of the majority of the members of the Appeal Panel who review the appeal is deemed to be a decision of the Appeal Panel.

(3) A tie vote on a matter is deemed to be a vote against the matter.

Appeal Panel reviews application and OOCHSC decision

13(1) The Appeal Panel shall review the applicant's application and the OOCHSC's decision if a notice of appeal is received within 60 days of the appellant receiving the decision under section 8.

(2) In reviewing the OOCHSC's decision, the Appeal Panel shall review only the written decision and reasons and the matters referred to in section 7(1) and shall not review any new evidence.

(3) An appeal must be reviewed and a decision made within 60 days of receipt of a notice of appeal.

(4) The Appeal Panel may confirm or vary the decision of the OOCHSC or substitute its decision for the OOCHSC's decision.

(5) If the Appeal Panel confirms, varies or substitutes its decision for the OOCHSC's decision approving the payment of services, the Minister shall pay for those services approved by the Appeal Panel.

(6) The Appeal Panel shall, within 10 days of making a decision under this section, excluding Saturdays, Sundays and holidays, send a written copy of

its decision with reasons to the Minister, each member of the OOCHSC, the appellant and, if the appellant is a person referred to in section 2(4), to the resident on whose behalf the appeal is made.

Expiry

14 For the purpose of ensuring that this Regulation is reviewed for ongoing relevancy and necessity, with the option that it may be repassed in its present or an amended form following a review, this Regulation expires on February 15, 2016.

THE OUT-OF-COUNTRY HEALTH SERVICES COMMITTEE

A. What is the Out-of-Country Health Services Committee?

The Out-of-Country Health Services Committee (OOCHSC) is established under the *Alberta Health Care Insurance Act*. The committee reviews, evaluates and makes decisions pertaining to requests for funding for the costs associated with medical, hospital and/or oral surgical services to be received outside of Canada.

B. Who are the OOCHSC members?

The OOCHSC is comprised of four Alberta physicians and a chair who is an employee of Alberta Health and Wellness. Committee members are appointed by the Minister of Alberta Health and Wellness.

C. Who can apply for OOCHSC funding?

- An Alberta resident registered with the Alberta Health Care Insurance Plan (AHCIP); or
- His/her representative, parent or guardian; or
- The attending physician or dentist who is primarily responsible for his/her care.

D. What conditions must be met for an applicant to be considered for OOCHSC funding?

- Funding must be approved **before** the services are provided.
- The services must be medically required.
- The services must be unavailable in Alberta or elsewhere in Canada.
- The services must be insured medical, oral surgical and/or hospital services.
- The services cannot be experimental or in the research stage (clinical trial).
- The applicant must be an Alberta resident who is registered with the AHCIP, and who has not opted-out of the Plan.
- The applicant must submit complete information as outlined in section G below.

Note: Requesting funding does not guarantee approval. All out-of-country health services funding decisions are based on medical and clinical information considered by the OOCHSC and current legislative requirements.

E. How are requests for funding submitted?

Requests must be submitted **in writing** and comply with the requirements outlined by the OOCHSC and described in Section G below. If you require more information about the request for funding process and live in the Edmonton area, please call (780) 415-8744 (toll-free from other areas in Alberta by first dialing 310-0000).

F. Where is the request for funding sent?

Chair, Out-of-Country Health Services Committee
Alberta Health and Wellness
10025 Jasper Avenue NW
PO Box 1360 Stn Main
Edmonton, AB T5J 2N3

G. What are the requirements?

Applicants must provide the OOCHSC with the following documents/ information to enable the Committee to determine eligibility for funding.

1. A letter of referral/support from the patient's Alberta physician or dentist that indicates the following:

- Specific treatment requested.
- Expected duration of initial out-of-country treatment, as well as the number and frequency of expected out-of-country follow-up visits, if any.
- Location/facility (street address) where treatment is to be obtained.
- Name and specialty of the out-of-country physician who will provide/ co-ordinate the treatment.
- Arrangements that have been made for follow-up care in Alberta.

2. A recent health history/summary of the patient that is relevant to the requested service. The history/summary **must** be prepared by the physician and **must** include:

- Diagnosis.
- Treatment previously provided, and the outcome.
- Copies of relevant findings and reports from specialists/consultants (in the field of medicine relevant to the treatment being sought).
- Copies of relevant diagnostic and laboratory reports.
- If applicable, additional treatment options explored but not pursued and the reason(s) why.

3. The reason the applicant is seeking out-of-country health services and a minimum of one of the following pieces of information to support that reason:

- Documentation confirming that Alberta/Canadian resources have been fully utilised, and/or
- Documentation confirming that this service is not available in Alberta or elsewhere in Canada, or
- If the service is available in Alberta or elsewhere in Canada, an explanation as to why it is not being utilised for this applicant.

4. Any other information which may be relevant.

This information is collected in accordance with the *Health Information Act* and the *Out-of-Country Health Services Regulation*.

H. When will the request be considered?

Once the OOCHSC receives all information listed in Section G, a letter will be sent to the applicant advising him/her that the request is complete. The OOCHSC has 60 days to make its decision once it receives the complete request.

Please note that only **complete requests for funding** will be considered by the OOCHSC.

I. If funding is approved, what is covered by the AHCIP?

- Insured hospital, physician and/or oral surgical services, as determined by the OOCHSC.
- Travel costs in accordance with the guidelines established by the Department of Health and Wellness and approved by the Minister.

The Out-of-Country Health Services Appeal Process

What is the Out-of-Country Health Services Appeal Panel?

The Out-of-Country Health Services Appeal Panel (Appeal Panel) is a committee established under the *Out-of-Country Health Services Regulation* to hear appeals on funding decisions made by the Out-of-Country Health Services Committee (OOCHSC) with respect to requests for insured services outside of Canada. The Appeal Panel is an independent committee that operates at arm's-length from the OOCHSC and Alberta Health and Wellness.

Who is the OOCHS Appeal Panel?

The Appeal Panel consists of six members (four Alberta physicians, one ethicist and one member of the general public) who are appointed by the Minister of Alberta Health and Wellness.

Who may submit an appeal?

An Alberta physician (on an Alberta resident's behalf), an Alberta resident or his/her personal representative who is not satisfied with the OOCHSC's decision.

How is a notice of appeal submitted?

A written notice of appeal must be submitted to the Out-of-Country Health Services Appeal Panel within 60 days of receiving the OOCHSC's decision.

Note: *The Appeal Panel can review only the application materials submitted to the OOCHSC and the OOCHSC's decision. The Appeal Panel is not authorized to review new information.*

Where is the appeal sent?

Office of the
Out-of-Country Health Services Appeal Panel
Alberta Health and Wellness
10025 Jasper Avenue NW
PO Box 1360 Station Main
Edmonton, AB T5J 2N3

Phone: 780-415-1555
Fax: 780-422-3552

When will the application be considered?

The Appeal Panel has 60 days from the date it receives the written notice of appeal to make its decision. Once a decision has been made, the Appeal Panel will notify the appellant of its decision within 10 working days. All Appeal Panel decisions are final.

If funding is approved, what is covered by Alberta Health and Wellness?

Alberta Health and Wellness will cover the cost of providing insured hospital, physician and/or oral surgical services approved by the Appeal

Panel. Travel costs will be paid in accordance with the guidelines established by Alberta Health and Wellness and approved by the Minister.

June 2008

Alberta Ombudsman
10303 Jasper Avenue, Suite 2800
Edmonton, AB T5J 5C3
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Prescription for Fairness

Special Report: Out of Country Health Services

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